S. HRG. 98-302, Pt. 2

PRODUCT LIABILITY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 44

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

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THE PRODUCT LIABILITY ACT

MONDAY, MARCH 5, 1984

U.S. SENATE
COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room SR-253, Russell Senate Office Building, Hon. Bob W. Kasten presiding.

Staff members assigned to this hearing: Marilyn Richmond, staff counsel, and Amy Bondurant, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The hearing will come to order.

I would like to ask Mr. Pope, Mr. Powers, Mr. O'Reilly, Mr. Goodman, and Mr. Schwartz to take their place at the witness table.

Today the Consumer Subcommittee will hold its seventh day of hearings on the Product Liability Act, a bill which would establish uniform product liability law in the United States. S. 44 represents the culmination of years of effort to develop uniform product liability legislation. We have heard from over 60 witnesses and have received thousands of pages of written comments and testimony.

The current bill is the product of numerous staff drafts and reflects input from business groups, consumer organizations, legal scholars, administration officials, and Members of the Senate Commerce Committee. The result is a fair and balanced bill which will give clarity and structure to an area of the law which has been riddled with conflicts and confusion.

Today's hearing was called at the request of Senator Heflin, and I am hopeful he will be joining us for at least part of the hearing this morning.

He has expressed an interest in learning and hearing about the changes made in the bill since our last hearing in April. These changes have greatly improved the legislation, and I am assured that its enactment will be in the public interest.

I would also like to thank the Senator from Washington, Senator Gorton, for his invaluable contribution to this effort.

There are many improvements that will be discussed here this morning. One of the most important is a provision to insure that an injured person will not lose his right to sue because the statutory time period for bringing action has run out before he knew or had reason to know of the injury.

Other changes to be discussed this morning include the standard of proof in design and warning cases, worker compensation and punitive damages.

The great divergence in product liability rules today results in a waste of judicial resources and excessive legal costs, as well as the inability of product manufacturers to meet their responsibility for safety. High litigation costs are then passed on to consumers in the form of higher prices for products.

A recent study by the Rand Corp. showed that attorney costs are even greater than they were a year ago when 77 cents was flowing to lawyers for every 66 cents paid to victims. The Rand Corp. study shows that for every dollar going to the claimants, 58 cents is spent on defense attorneys. Of the dollar that the claimant receives, 41 cents goes to his attorney.

I believe that a primary goal of this important legislation is to reduce the unnecessary legal costs that have invaded our product liability system.

I look forward to this hearing and would like to welcome today's witnesses. It is my intention to receive written comments from each of the witnesses for inclusion in the record. It is my intention to use a system of bells this morning whereby each of the witnesses will be asked to summarize their remarks in a period of roughly 5 minutes. The yellow bell will go off when it's 4 minutes, and the red light will go off when the 5 minutes have expired.

It is also my intention, because I am anticipating that there will be other members of the committee here, to work on a 5-minute system of questions within the committee as well, so that we will be able to have as many questions as possible and as many members participating as possible.

Senator Gorton has a statement.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. Mr. Chairman, I am anxious to hear the testimony of the witnesses here this morning. Many changes have been made in S. 44 since its introduction, many at my request. I believe that the bill is substantially more balanced than it was as introduced. I believe it deserves to be presented to the full Senate for its consideration. This is, however, an area of great complexity. And one in which I have some, but by no means enough, knowledge to feel totally confident on every aspect of the bill.

I will, therefore, listen with great interest to the witnesses this morning. And I intend to listen with equal interest to my colleagues in the Senate to be sure that any bill we send to the House on this issue is both fair and workable, not just in theory but in fact. I must admit that on that issue I am quite disappointed that most members of the trial bar have not consented to be active participants in this process. Their insight would have been a great help to all members of the committee. Their absence from this discussion is regrettable.

Again, I thank the Chair for this hearing and Senator Heflin for his desire to insure that the members of the committee are fully aware of the changes which have been made to the bill and their impact on the bill.

Senator KASTEN. Our first witness this morning is the Honorable Jack Pope, conference of chief justices, chief justice, Supreme Court of Texas, Austin, Tex.

Mr. Pope.

STATEMENTS OF HON. JACK POPE, CONFERENCE OF CHIEF JUSTICES, SUPREME COURT OF TEXAS; WILLIAM C. POWERS, JR., PROFESSOR, UNIVERSITY OF TEXAS SCHOOL OF LAW; CHARLES B. O'REILLY, COUNSEL, ON BEHALF OF ASBESTOS VICTIMS OF AMERICA; RICHARD M. GOODMAN, COUNSEL; AND VICTOR E. SCHWARTZ, COUNSEL TO THE PRODUCT LIABILITY ALLIANCE

Judge POPE. Thank you, Senator.

I do appreciate this opportunity to appear. I appear this morning on behalf of the Conference of Chief Justices, and I want to assure you, Senator, and the members of this committee and all of those who are for and against this bill that the chief justices, and the 2,000 judges in Texas of all levels, and all over the United States are just as interested in getting a fair solution to this problem as this committee.

Our concern and our only concern is what impact this will have upon the system. And when we look at that, we view the bill with dismay. It has no precedent. It usurps the judicial function. It disturbs many settled practices about which we are gathering up all of what has been called diversity. There is being achieved through the common law the uniformity that this bill, in our judgment, will destroy; this bill will create a diversity among 56 jurisdictions. Cases must be decided, and they can only be ultimately decided by the U.S. Supreme Court, a court that is already overworked and overwrought.

It will destroy the developed common law in the whole range of tort reparations, and it will disrupt practices and procedures that many of us have worked for a lifetime in order to straighten out and to streamline.

Now, I want to address some of the particulars of this bill, and just before I do that, I recall for all of us that less than a year ago I filed with this committee a written statement in which I stated, if given sufficient time, there will be a uniformity within the common law development; and I predicted that that would be accomplished before this bill was enacted, if it ever be enacted by the U.S. Congress.

I say to you that at least in my State and in the State of Missouri, we have come to that realization before the committee passed or approved the bill.

In the middle of last month in a case decided by the Supreme Court of Texas, we addressed this subject and the same problems; and in our written opinion, in the middle of the page, we wrote: "Judicial Trend Toward Comparative Fault." We then collected, as is the common law practice, the decisions of Alaska, and California, and Florida, and Montana, and West Virginia, and Wisconsin, who has been the leader in this, and New Jersey, and Kansas.

And we pitched—I say this with great respect—our comparative fault, so that the supplier, the manufacturer will not be treated un-

fairly; and he has been treated unfairly in the past. The chief justices are just as concerned about a fair system as anybody. And left alone, we will arrive at this favorable result before the Congress will act on this, and we will save, out of the wear and tear of all of this thing, things that are otherwise going to go down the drain, including the third branch of the State governments.

We relied in our written opinion upon some of our favorite writers and authors, and we quoted them to reach this harmonious result. We quoted Mr. Schwartz and Mr. Sales and Professor Wade. We believe in them, and we did what they said we should do. And what I am saying is we have achieved this harmony.

Now, there are many parts of this bill which—my time has already run out—that will require decades of construction such as, "practical technological feasibility." "Proximate cause" is used. It is not defined. "Superseding cause" is used. It is not defined. The preemption of other laws—I will pass over that.

But when we get down to sections 5 and 6, I advise you that there is the trick in this bill. There is the pea underneath the shell. If you will examine those, you will find that those provisions define everything so that something is or is not a defective construction or a design defect or a marketing or warning defect.

Defined into whether there is the defect are all of the defenses, so that you never get to the comparison. The party who is wronged and harmed, he has to submit issues; and I tried that on last night to see if a jury could understand an issue, because it has to be settled down in that jury theater. And I do not believe that a jury can understand this.

But what the bill does, if you will examine it—and now I am through—is that it puts all of this up into the definition of "defect". If there is no defect, the lawsuit is over. This is not a comparative fault bill.

[The statement follows:]

STATEMENT OF HON. JACK POPE, CHIEF JUSTICE, SUPREME COURT OF TEXAS

I am Jack Pope, Chief Justice of the Supreme Court of Texas. I sincerely thank the committee for this opportunity to speak about the working draft of October 19, 1983, of the product liability bill.

I appear at this time as the representative of the Conference of Chief Justices. I serve on the State-Federal Relations committee for that Conference. In its fall meeting, 1982, the Conference unanimously adopted a Resolution disapproving a federal product liability bill. That decision is still the decision of all of the Chief Justices.

The Chief Justices approach the notion of federal legislation in tort reparations matters with dismay. Our opposition is not oriented toward either plaintiffs or defendants but is directed toward the preservation of our system of federalism as it applies to state judiciaries. The bill in our judgment usurps the judicial function of every state. The bill, if enacted, will disturb product law that is already uniform in important respects, and it will destroy the developed common law in the whole range of tort reparations. The bill will disrupt practices and procedures that have been simplified and will require every state to begin again. The bill will require decades of interpretation to unravel new concepts and new definitions in the over-detailed provisions of the bill. It is a massive intrusion by the federal government upon the states. I shall respect your time and shall hurriedly focus attention on specific parts of the bill.

SECTION 2(4). "EXERCISE OF REASONABLE PRUDENCE"

This term is defined and superficially it comes across as rather familiar. Actually the definition in my opinion differs from the standard that is used in every state in the United States. I focus your attention upon the last clause, which says, "and

judgment that society expects of its members for the protection of their own interests and the interests of others." This is novel and frightening. I frankly do not know what it means. It will be explained by many courts in many ways. The clause looks surprisingly like the community standard used in obscenity cases. If this be so, we really have no standard. I rather suppose that some courts will construe the clause to mean an industry standard.

SECTION 2(5). "EXPRESS WARRANTY"

A casual examination of this paragraph indicates to me that the bill is intended to supercede Restatement 402(b), and it will abolish strict liability in the case of false representations. I do not know, and we will not know until fifty-six jurisdictions start writing on whether the definition includes or excludes strict liability grounded on implied warranty.

SECTION 2(7). "MANUFACTURER"

Facially, this is another example of what appears to be fair, but let us examine it. A manufacturer is one who is engaged in business "to design or formulate and to produce, create, make, etc." This means that A can design a tank, airplane, or any other kind of equipment. A does not, however, produce, create, or make the tank from the design. An independent company B is the one who will produce, create, and make the products. Under the definition of the bill, neither is a manufacturer because neither meets both requirements. Neither would be liable as a manufacturer. This raises a further unanswered interesting question. If, in this instance, the act does not apply because there is no manufacturer, does the state law then apply?

SECTION 2(9). "PRACTICAL, TECHNOLOGICAL FEASIBILITY"

This is a new term that will produce varying applications. It is an unfamiliar term to those who deal with and study tort matters. Here again the phrase "capable of use in the manufacture of a product, and economically feasible for use by a manufacturer" suggests that the measure of safety will be that of the industry standard. Is it a safe one if everybody in the industry is careless or avoids knowledge. Are we then to say that the standard, by statute, is nevertheless one of uniform carelessness?

SECTION 2(10). "PREPONDERANCE OF THE EVIDENCE"

This term is enough like the one familiar to judges and the public, yet different enough to produce many, many interpretations and create diversity instead of uniformity. As an example, the definition starts off very well, but in Line 15 it adds "value of the aggregate evidence on either side." I do not know what that means. It means something and perhaps something different from usual definitions of the term or it would not have been used.

SECTION 2(12)(C)(21). "LEASES OF PRODUCT"

This section provides that a seller does not include a person who leases a product under a lease arrangement in which the selection, purchase, maintenance, and operations of the product are controlled by a person other than the lessor. We will have many instances in which a dummy company purchases and leases to a construction company or someone else and thereby immunizes all liability.

SECTION 2(14). "REASONABLY ANTICIPATED CONDUCT"

The section says that the term means "conduct which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." This is a change of our Texas definition of foreseeable misuse, and the provision probably limits one's duty to intended users. If so, one could put on every product the label "This product is intended to be used by trained workmen." This would immunize the supplier from liability.

SECTION 3. "PREEMPTION OF OTHER LAWS"

This act preempts state laws concerning express warranty cases, implied warranty cases, strict liability cases, negligence or gross negligence cases, rules of practice concerning the submission of special issues, instructions to jurors, and many rules of evidence. The act in part raises questions by its provisions that no jury trial will be permitted. Gross negligence is authorized by our Constitution in Texas so that body

of law will be unsettled. The denial of a jury trial presents questions about violations of the 7th Amendment to the United States Constitution. Since the act supercedes state laws and provides that the district courts of the United States shall have no jurisdiction and requires all states to start from zero and begin over developing our procedures and interpreting the statute, the inevitable conflicts will have no place to go except to the United States Supreme Court. That court is already overworked and overwrought. It will be impossible for that court to grant enough writs to settle the myriads of problems that this act will generate for decades.

The reach of the harm to state systems extends far beyond the mere trial of products liability cases. States cannot, consistent with sound administration of justice, judicial economy and justice, have one set of rules to try products liability cases and a different system to try an ordinary negligence case or a malpractice case. Even the joinder of a physician in a products liability case concerning his administration of defective drugs, will require two different systems of trial and submission to the jury or a complete overhaul of our state tort systems.

SECTION 4(2). "PROXIMATE CAUSE"

The section states that a manufacturer is liable if the claimant establishes certain things stated in Section One and also that the unreasonable dangerous aspect of the product was a "proximate cause of the harm complained of by the claimant." Most statesd are familiar with the phrase, "producing cause," in products liability cases. Proximate cause has different meanings and a well defined meaning in Texas. Does this mean "cause in fact" or does it mean "foreseeable cause"? The provision creates problems that presently do not exist.

SECTION 5(A)

Section 5(a)(1) states that a product is unreasonably dangerous if it deviates in a material way

"(1) from the design, specifications, formula, or performance standards of the manufacturer."

Does the manufacturer set his own standards whether they be good or bad? Do we penalize the ultra careful manufacturer even though his standards may be far above those of all others?

Section 5(b)(1) and the remaining part of Section 5 are a wholesale and gross assault upon the body of tort law. Whereas strict liability applies to Section 5(a)(1), everything following 5(b)(1) concerning design is grounded on negligence. This is confusing and the long, intricate provisions are loaded with complex sections that will require years of interpretation before it is sorted out. I count at least eight separate interrogatories or special issues that must be submitted to determine the simple question whether it is a design defect. The section requires a claimant to prove affirmatively:

"(A) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which allegedly caused the claimant's harm; and

"(B) a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used."

A claimant, after making that proof, apparently must then submit inferential rebuttal issues and obtain findings on three additional facts. He must first prove that there is a defect, and then he must overcome three items that the act says "do not constitute an unreasonably dangerous design defect."

This injects a very bad practice into jury trials. We once had inferential rebuttal issues in Texas and found that juries could not understand them. The act's definitions and the statements of what must be proved create such a proliferation of issues that the practice will not work in the jury theater. This is a backward step. One must ask juries to weave their way through too many issues and problems. The act defines a claimant out of court. Is that the purpose of the act?

SECTION 6. "PRODUCT WARNINGS OR INSTRUCTIONS"

This section consists of five more pages of intricate definitions and instructions which it will be difficult for a jury to handle. Section 6(d), like Section 5, requires additional inferential rebuttal issues.

Section 6(e)(1) provides that a product is not unreasonably dangerous for lack of warnings regarding dangers that are obvious. Jursidictions that have been caught in the "open and obvious" net have had to reject the phrase. It has multiple meanings

and many interpretations. It can mean that a state of facts is established as a matter of law. It can mean that a fact issue is raised. Texas and most states rejected it as a spurious issue that is subsumed under such terms as negligence, contributory negligence, and as an expression about the state of the proof.

The section circumscribes the duty of the manufacturer for reasons that are difficult to understand. Hardly anything is cheaper than giving a warning or pasting on labels.

This bill is not a comparative fault bill. Sections 5 and 6 concerning definitions of product construction and design and product warnings or instructions expose the nature of the bill. Up to this point, the bill has not even addressed comparative fault. Comparative fault determines the percentage of fault on the part of plaintiff and defendant and fixes a percentage chargeable to each. Sections 5 and 6 in their definition of defects, designs, and warnings cut off and defeat the claimant at that stage before he ever submits the comparison. The intricate definitions cut off the claimant so that the comparison would be hard to reach.

There are specific problems with many other sections, but I shall leave it to others to mention them. I do mention, however, Section 9(f) wherein it speaks of "superseding cause." That term like "proximate cause" is undefined.

"PUNITIVE DAMAGES"

The section on punitive damages proceeds upon the basis that one should have two trials even though one is enough. Section 12(a)(1) requires a trial on liability and compensatory damages. It requires a second trial on punitive damages. This provision is consistent with the entire bill in that it makes complex that which has been simple. It imposes additional trials upon our courts. The provisions concerning punitive damages provide that the court, not a jury, shall make findings of fact. This too presents right-to-jury constitutional questions.

The act authorizes a one time assessment for punitive damages. Section 12(g) stays all punitive damages after the first is paid; it also stays a trial court from proceeding with his docket. Spelled out, I believe this means that punitive damages for $5,000 on the first Pinto accident would have been full and final payment in future punitive damages cases.

The Trust Fund Doctrine will require judges to preside over Punitive Estates that may never be closed. The concept is very interesting.

Finally, I suggest that a federal comparative fault bill is not needed. I filed with this committee about a year ago a statement in which I said that any problems we were having in Texas would probably be resolved before Congress enacted this bill. On February 18, 1984, the Supreme Court of Texas unanimously adopted the concept of comparative fault in products liability. *Duncan* v. *Cessna Aircraft Company*, 27 Tex. Sup. Ct. J. 213. We adopted the system after examining and deciding to follow the lead of a multitude of common law decisions. Those included decisions from California, Florida, New Jersey, and Wisconsin, a state that has been a leader in this whole development of the law. A plaintiff under *Duncan* who asserts a claim against a manufacturer or supplier is responsible for all of his own contributory negligence, misuse, alteration and fault, and his percentage of fault is subtracted from any damages. The system developed in Texas and all of these other states is simple to manage and they are uniform with each other. Legislation, more than anything else, has been the complicating factor.

On November 22, 1983, in *Gustafson* v. *Benda*, 661 S.W.2d 11, the State of Missouri joined this group of states. This too was done through the common law and not by legislation. Missouri by judicial decision adopted the Uniform Comparative Fault Act.

We would hope that the goal to achieve fairness through comparative fault in products cases and a feasible uniformity will be ongoing. We respectfully suggest that we are reaching those goals in a manner that is achieving an orderly development of the law in each state without the disruption of our court systems.

Senator KASTEN. Thank you, Judge Pope.

The next witness is Prof. William C. Powers of the University of Texas School of Law.

Mr. POWERS. Thank you, Senator.

I am appearing here today on my own behalf. I would like to focus my remarks on the standard of liability for defining defects, specifically for defining design defects.

The bill, as it is now drafted, basically uses a negligence standard to define design defects. I would like to emphasize three reasons why a negligence standard is desirable. First, strict liability as it is now being applied in design cases is virtually indistinguishable from negligence and, therefore, from the standard that is adopted by the present proposal.

Under current law, even jurisdictions that use strict liability provide for liability only if a product is defective. They then go on to define defectiveness in a way that is virtually indistinguishable from negligence.

Many courts openly use negligence standards to define defectiveness, and that is exactly what the current bill does. But even courts that purport to distinguish between so-called strict liability and negligence, and argue that there would be a major change in the current bill regarding design defects, even those jurisdictions use a test of defectiveness, called the risk utility test, that is virtually indistinguishable from negligence. This test weighs the benefits and risks of a particular product design to determine whether those risks are reasonable, and therefore, requires through the same analysis that a court would go through under the negligence standard to define design defects under the bill.

Some courts have tried to argue that there is a difference between evaluating the product itself, on the one hand, versus evaluating the conduct of the manufacturer on the other hand, and that there is a major distinction here between defectiveness under strict liability and negligence. That simply is not the case.

Courts that purport to be looking only at the product take into account as a feature of the product the product's price and the cost of making the product. The Texas Supreme Court does that, and nearly every court that goes through the risk-utility definition of defectiveness does that. But once we take into account the price of a product—which is merely a reflection of the manufacturer's conduct in manufacturing the product—the very same considerations, including foreseeability, that are issues in a negligence case—explicit issues in a negligence case—are worked in through the back door. This is a result of defining defectiveness in a way that takes into account the product's price as a feature of the product under the risk-utility test. It would be much preferable to do openly what courts are now doing in the guise of purporting to evaluate the product rather than the manufacturer's conduct.

Second, the attempts which courts have in fact made to and distinguish between negligence and so-called strict liability in design cases have created a great deal of confusion. By trying to draw fine distinctions, the courts have created a situation where there is a great incentive to litigate, to appeal, and to add to litigation costs. But more importantly, these distinctions are unfair, not to manufacturers; they are unfair to consumers.

This debate is not really one between manufacturers and consumers. Consumers pay extra price in order to generate funds out of which these compensation awards are given. That money ought to be distributed fairly among consumers according to reasonable distinctions that consumers and the public and, indeed, even lawyers can understand. Let me give one example of a distinction drawn under current law.

If a manufacturer designs a product using state-of-the-art components, the product is not defective, and there would be no recovery. If, however a manufacturer manufactures a product as safely as possible because the manufacturer has used state-of-the-art testing and state-of-the-art research to discover the product's risks, the product in most States would be defective—even though state-of-the-art testing had been used—and the plaintiff would recover.

That is a distinction that I think the public and, indeed, lawyers cannot understand. Why should one person recover, while another does not, even though both of these people have paid a higher price in order to support the compensation scheme?

I would like to make one other very quick point. This bill will have no impact at all on product safety. The Consumer Product Safety Act, the FDA, and similar regulations are likely to have a major impact on product safety. As for the fine distinctions between negligence and strict liability that are the subject of the liability standard in this bill, there is no empirical evidence whatever that they will have an impact on product safety.

Thank you.

Senator KASTEN. Your complete statement will be made a part of the record.[1]

Thank you, Professor Powers.

[The statement follows:]

STATEMENT OF WILLIAM C. POWERS, JR., PROFESSOR OF LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW

I. INTRODUCTION

My testimony concerns the provisions of S. 44 that deal with the standard of liability for manufacturers (§§ 4–7). S. 44 reflects a balanced approach to products liability, and specific provisions should be judged in light of this overall balance. Nevertheless, I will focus my remarks on the specific provisions concerning the standards of liability for manufacturers.

I support the approach taken in sections 4 through 7. Basically, these sections provide that a manufacturer may be held liable for injuries caused by its product if:

(1) the product does not conform to the manufacturer's specifications or materially deviates from otherwise identical units (§§ 4(1)(A), 5(a));

(2) the manufacturer is negligent in designing the product (§§ 4(1)(B), 5(b));

(3) the manufacturer is negligent in providing warnings or instructions for use (§§ 4(1)(C), 6); or

(4) the product does not conform to an express warranty made by the manufacturer (§§ 4(1)(D), 7).

In the terminology normally used in products liability law, these provisions establish strict liability for manufacturing defects (flaws) and liability for breach of an express warranty, but they require proof of negligence in cases involving design defects and warnings defects.

Strict liability for manufacturing defects and liability for breach of express warranty are uncontroversial. Most manufacturers accept responsibility in these situations. The primary issue before the Committee is whether to adopt negligence as the standard of liability in cases involving product design and warnings.

Negligence is already used in many states to govern product design, and it is used in the overwhelming majority of states to govern warnings. Even in states that purport to eschew negligence, a standard nearly identical to negligence is in fact used. Even the supposed differences between the two standards are arbitrary and incoherent. The resulting complexity severely inhibits dispute resolution. More importantly, it arbitrarily—and therefore unfairly—distinghishes among victims, providing recovery for some, while denying it to others. The explicit adoption of negligence in cases involving product design and warnings would be a major improvement.

[1] The attachment to the statement was retained in the committee files.

Unfortunately, the products liability problem is usually analyzed as a struggle between consumers and manufacturers. Although fairness between these two groups is important, it is also important to distribute compensation dollars fairly among victims. Current law selectively provides compensation according to distinctions that are unsupportable. Moreover, an explicit adoption of negligence in cases involving product design and warnings would not undermine appropriate incentives for manufacturers to produce safe products.

Many of the arguments in the body of my testimony are summaries and examples of more complex arguments that I have made in "The Persistence of Fault in Products Liability." 61 Texas Law Review 777 (1983).

II. CURRENT LAW CONCERNING PRODUCT DESIGN AND WARNINGS DIFFERS FROM NEGLIGENCE ONLY SLIGHTLY AND ARBITRARILY

Although courts often speak of "strict" liability, they uniformly require a plaintiff to prove that his injury was caused by a "defect" in the manufacturer's product. The meaning of defectiveness has created much difficulty and confusion. In cases involving product design and warnings, many courts already explicitly use negligence as the standard of defining defectiveness. Even courts that purport to eschew negligence have adopted a standard of defectiveness, known as the "risk-utility" test, that is very similar to negligence and differs from it only arbitrarily.

Under the risk-utility test, a product has a defective design if it has a design feature whose risks outweigh its benefits. All product designs impose some risks, but they also provide benefits. For example, a compact automobile may impose increased risk of injury in a collision, but it also provides better gas mileage and handling. Compactness is not a design defect if these advantages outweigh the additional risk. The gas tank design of the old Ford Pintos, on the other hand, were defective because its benefits did not outweigh its risks.

The risk-utility test of defectiveness is similar to negligence in that it applies a cost-benefit analysis to determine whether a risk is "unreasonable". Proponents of the risk-utility test of defectiveness have argued that it differs from negligence, however, in that it focuses on an evaluation of the product rather than the manufacturer's conduct. This distinction often turns on the issue of foreseeability: to ascertain whether a manufacturer has been negligent, a court considers only those risks that were reasonably foreseeable when the product was manufactured. Defectiveness, so the argument goes, considers all of a design feature's risks, whether or not they were foreseeable when the product was manufactured. S. 44 adopts negligence for cases involving product design and warnings by requiring a plaintiff to prove that a design feature's risks were reasonably foreseeable when the product was manufactured

This supposed distinction between defectiveness and negligence is illusory and/or based on arbitrary distinctions. Consider the compact automobile. Under the risk-utility rest of defectiveness, the manufacturer would escape liability if the benefits of compactness—such as fuel economy and ease of handling—outweigh its risks. The manufacturer might also rely on another benefit of small cars: they are less expensive to build (and therefore to buy) because they require less labor and material. The problem is that a manufacturer might also argue that a product is less expensive because it was not tested as thoroughly, leaving some of its risks unknown. If this argument were permitted, however, it would be equivalent to an argument that the product's risks were not reasonably foreseeable, which is precisely the test used to determine negligence.

My point is not that courts would permit a manufacturer to count the cost of testing in the risk-utility test of defectiveness. Forbidding such an argument is necessary to distinguish defectiveness from negligence. The problem is that a reduction of product cost based on material and labor can justify risks under the risk-utility test of defectiveness, whereas a reduction of product cost based on testing and quality control cannot. Otherwise, there would be *no* difference between negligence and defectiveness.

Product cost is simply a reflection of the manufacturing process. Consequently, an evaluation of the product under the risk-utility test of defectiveness includes the same factors as an evaluation of the manufacturer's conduct under negligence, unless certain product costs—testing and quality control—are arbitrarily excluded from consideration.

Another distinction many courts make under current law is that a product is not defective if it conforms to state-of-the-art technology. For example, risks imposed by a manufacturer's failure to put a kill switch on a pleasure boat engine (causing it to injure a driver who falls overboard) do not render the boat defective if kill switches

were not available when the boat was sold. The rationale is that we can not expect a manufacturer to make a product safer than is possible under technology that was available when the product was manufactured. The mere fact that a risk could not be discovered under state-of-the-art testing procedures, however, is normally not a defense. For example, a drug may be defective because it imposes risks that were not reasonably or scientifically discoverable when the drug was sold. In both cases, we could not have expected the manufacturer to have altered its design, but one product is defective while the other is not. Again, the distinction is irrelevant to the relative claims of the individuals to receive compensation.

These are but two examples of arbitrary distinctions courts have been forced to develop to distinguish between negligence and defectiveness. The problem has arisen because courts have attempted to eschew both negligence and true strict liability. The requirement of defectiveness supposedly occupies a middle ground. This middle ground can be maintained, however, only if an evaluation of a product's risks and benefits differs from an evaluation of the manufacturer's conduct. In trying to maintain this artifical dichotomy, courts have developed a baroque system of distinctions that are irrelevant to the competing claims for compensation. The intricary and artificiality of these distinctions have created a situation in which trial courts and litigants cannot predict the next twist. This, in turn, creates incentives for litigation and appeal.

An explicit recognition of negligence as the standard of liability in product design and warning cases—as S. 44 would do—would not be a drastic change in current law. Rather, it would merely remove the illusiory and/or artifical distinction between defectivenss and negligence that current law purports to draw. In doing so it would substantially simplify the liability issue by relying on workable, well understood concepts of negligence.

III. CURRENT LAW DISTRIBUTES COMPENSATION DOLLARS UNFAIRLY

If the distinctions drawn under current law were merely illusory and unworkable, they might be tolerable. But they also lead to an unfair allocation of compensation dollars among competing claimants.

Compensation dollars are not free. If they were free, the products liability problem would dissolve, since all injured claimants could recover. As in the case of all scarce resources, it is essential that compensation resources be allocated efficiently and fairly. The ultimate source of compensation dollars in products liability cases is the consumer.

Proponents of strict liability correctly aruge that the manufacturer can spread the loss to the entire population of consumers. The issue is not so much a conflict between consumers and manufacturers—although manufacturers should be treated fairly—as it is a conflict among consumers who have competing claims for compensation. Since consumers pay a higher price to cover the risk of liability, they essentially buy "insurance" to cover the risk of injury. One issue is the aggregate extent to which we should have this insurance coverage; to what extent should we raise prices to cover accident costs?

If the aggregate level of liability were the only issue, problems inherent in current law would not be so acute. A second issue, however, is whether compensation dollars—to which all product consumers contribute—are fairly distributed. The negligence standard adopted by S. 44 greatly increases the fairness of this distribution.

Under a negligence standard, claimants are given or denied compensation depending on a determination of whether the manufacturer's conduct was "inappropriate". Some claimants are permitted to recover while others are not, but the basis for this decision is one that the claimants can understand as being relevant to the issue of recovery. It is the same reason that some automobile accident victims recover for their injuries while others do not.

It may be desirable to compensate all victims of injury. Such a system would be expensive, and we might be required to reduce the magnitude of recovery, as we do under Workers' Compensation. Whatever the other advantages and disadvantages of such a system, it is at least fair among the class of competing claimants because it treats competing claimants equally. Liability based on negligence does draw distinctions among competing claimants, but it does so fairly by relying on a distinction that is morally relevant: the defendant's blameworthiness due to its inappropriate conduct.

Current products liability law cannot make this claim. As I suggested in section II, courts that purport to distinguish between defectiveness and negligence do so only in irrelevant, arbitrary ways. One claimant may be denied recovery, because the manufacturer demonstrates that the product could not have been made safer

under state-of-the-art technology, while another claimant would recover even though the manufacturer could not have made the product safer, this time because it was impossible to discover the product's risks. Claimants in both cases deserve compensation equally, and in neither case has the defendant been blameworthy. The only difference is the reason the manufacturer could not have been expected to make a safer product. The public surely would not understand why one of these claimants can recover while the other cannot, not merely because of the complexity of law, but because the distinction is irrelevant to the propriety of recovery.

Similarly, section II explained why one claimant may be denied recovery if a manufacturer justifies a product's risks with cost savings attributable to material and labor, but another claimant may recover notwithstanding similar savings attributable to reasonable decisions to forgo further testing. Again, in both situations the manufacturer acted reasonably, but one of the claimants would be permitted to recover while the other would not.

Proponents of "strict" products liability argue that it spreads risks throughout the population of consumers by internalizing accident costs into a product's price. This goal is not limited to defective products, however, Accidents caused by nondefective products involve costs that could be internalized and spread. If the plaintiff's need were the only factor, a victim of a defective product deserves compensation no more than a victim of birth defects, disease or nondefective products. A comprehensive compensation scheme for all injuries would be fair, but that is not what current law accomplishes. It gives large awards to some claimants and nothing to others, based on arbitrary distinctions that have nothing to do with the equity of recovery.

Products liability law should do more than merely determine whether to use resources to compensate victims of tragedy; it should fairly distribute the resources that are in fact used. "Strict" products liability channels large portions of this money to a specific group of people—victims of defective products—and gives nothing to victims of nondefective products and disease. If losses are shifted because one party is blameworthy, the decision to shift the loss rests on a morally defensible basis. If losses are shifted simply to spread them throughout the population of consumers, participants in the resulting insurance program should be treated fairly. All consumers pay the price of liability through higher prices. They should benefit from the "insurance" scheme equally or according to fair distinctions. Large tort awards to some and nothing to others, based on arbitrary distinctions courts have developed to distinguish defectiveness from negligence, are egregiously unfair.

The products liability debate has unfortuantely been characterized merely as one between manufacturers and consumers. In fact, it is more accurately characterized as a problem of competing claims to compensation dollars. Certain, but reduced, compensation to all victims of product injuries would be a fair, if expensive, approach (although the question would remain why to exclude victims of disease). Compensation based on fault is also fair, because it selects specific persons for compensation according to a morally relevant criterion. Supposed "strict" liability is unfair, because it selects recipients of compensation on the basis of morally irrelevant criteria that lawyers have developed to define defectiveness.

The adoption of negligence in S. 44 to govern cases involving product design and warnings would improve the fairness with which compensation dollars are distributed.

IV. ADOPTING A NEGLIGENCE STANDARD WOULD NOT REMOVE INCENTIVES TO IMPROVE PRODUCT SAFETY

In addition to providing a fair system of accident compensation, products liability law should provide incentives to manufacturers and consumers that will optimize product safety. Some opponents of negligence argue that "strict" liability is needed to give manufacturrs appropriate incentives to produce safe products. This argument is fallacious, because negligence provides manufacturers with appropriate incentives to manufacture safe products. Even if manufacturers were liable for all injuries caused by their products, they would stop investing in additional safety precautions when those safety precautions ceased to be cost effective. This is precisely the point at which neglignece law determines that reasonable care does not require additional safety precautions, and a failure to use reasonable care results in liability even under negligence. Consequently, both systems tend to give manufacturers an incentive to use reasonable care.

As section II suggests, current law is already very close to negligence. It is unlikely that a further incremental change will have much effect on the conduct of manufacturers concerning product design. Specific requirements, such as those promulgated by the Food and Drug Administration and the Consumer Product Safety Com-

mission, are far more likely to improve product safety. Indeed, a premise underlying these regulatory schemes is that normal tort liability rules do not have a significant enough effect on product safety. There is no empirical evidence that a marginal change from current law to negligence would have an adverse effect on product safety.

V. CONCLUSION

Many states currently use negligence to govern product design and warning. Even states that purport to eschew negligence, use a standard of defectiveness that differs from negligence only marginally, and even then arbitrarily. An explicit adoption of negligence would not constitute a drastic change, but it would make the system more workable and less arbitrary.

Prominent cases evoking public alarm—such as the Pinto and asbestosis cases—do so because the public feels that the manufacturers knew or should have known about the product risks but failed to take reasonable steps to alleviate them. Negligence would not insulate these manufacturers from liability. Rather, negligence specifically accounts for the reason for public concern.

All consumers pay for the compensation provided by products liability law in the form of higher prices. Decisions concerning who is compensated for injury should be based on fair criteria. Negligence provides fair criteria; "strict" liability based on defectiveness does not.

As long as consumers pay higher prices for compensation, it is egregiously unfair to give the lion's share to a few victims and nothing to others unless fair criteria distinguish the cases. S. 44 does this by explicitly recognizing negligence as the standard to govern product designs and warnings.

Senator KASTEN. The next witness is Mr. Charles B. O'Reilly, a partner in the law firm of Greene, O'Reilly, Agnew & Broillet in Los Angeles, Calif.

Mr. O'Reilly.

Mr. O'REILLY. Thank you, sir.

We are appearing here on behalf of the Asbestos Victims of America, which is an organization, a nationwide organization of asbestos victims, and at the request of its founder and executive director, Mr. James Vermeulen, who is also present here today.

Our position is as follows, the position of the Asbestos Victims of America: If uniformity is needed in this area—and we contend any lack of uniformity from State to State is more the result of differences in rules of evidence, procedure, et cetera—then uniformity should not be accomplished at the sacrifice of safety.

This bill sacrifices safety in the name of uniformity. If we need uniformity, let us have a uniform strict liability law and not a uniform law of gross negligence. I believe the asbestos history illustrates how this bill would impact on safety.

Through the 1930's, 1940's, 1950's, and early 1960's in this country traditional negligence was the rule of law imposing liability on a manufacturer. As a consequence, industry did not do any studies on the effect of its asbestos product on the users of its product. However, because of the body count that was developing over those four decades, in 1964 the medical profession did—when the medical profession did its study, it disclosed a vast amount of disease; therefore, industry had constructive knowledge of the danger.

However, strict liability was also introduced into law at that time, and a short 6 years later the asbestos industry, because of strict liability laws, admittedly had to develop a substitute for asbestos to get it out of the product, because no longer would they have the benefit of traditional negligence principles. They had to remove the asbestos from the product and come up with a substi-

tute, because strict liability did not focus on fault; it focused on the risks and dangers of the product.

This bill goes back even further than negligence in abrogating the principles of strict liability, which today is substantively the same from State to State; that is, that a defective product possesses unreasonable dangers that create a risk of injury and causes an injury to a consumer.

Now, in this bill a few examples will illustrate the drastic provisions. For example, in section 5 it deals with the manufacturing defect. This bill defines a manufacturing defect as requiring a material deviation. Present law says any deviation. Present law requires tight quality control. This law, by requiring a material deviation, tells industry to lessen quality control, because what is material is what is acceptable by industry.

This allows for very lax quality control. In fact, it mandates it. It allows industry to set its own standard on quality control. The provision on section 5 dealing with design defect requires that the claimant prove negligence on the part of the manufacturer—that is, ignorance of a danger that it knew or should have known—plus conduct that is violative of what the ordinary, reasonable manufacturer would do.

That is beyond traditional negligence principles and gets into gross negligence. In addition, subsection (c) talks about the plaintiff or claimant being aware of the risk. In essence, it uses contributory negligence as a total bar to any claimant's recovery. Subsection (c) basically says it is a total and absolute defense if a claimant used a product when a reasonable person in the community would be aware of an unsafe aspect of that product. The person's conduct is not analyzed beyond that. It just involves a complete hybrid of contributory negligence to bar claims.

That subsection, 5b2(c), would bar 90 percent of the presently existing strict liability lawsuits in this country and would bar 90 percent of the lawsuits that could be filed under this bill.

The section on warnings, which is section 6, basically says that the manufacturer has to warn of known dangers, only dangers that would be known to a reasonable manufacturer, and he only has to provide a warning that would be a good warning for a reasonable man, and only then if industry is doing it. And then it only has to warn of the dangers known to the reasonable manufacturer and dangers that would be unknown to the reasonable man.

If you take all the provisions of section 6 and the duty to warn and look at them, you will see that the only time there is a duty on the part of the manufacturer to warn is when the reasonable manufacturer is aware of a danger that the reasonable user would not be aware of the danger. It boggles the imagination to imagine how a jury can distinguish between both reasonable men's standards, but that is the only time there will be a duty to warn.

Sections 9 and 10 of this act completely abrogate the law of joint and several liabilities that presently exist. Under section 9, an innocent claimant has all of his damages reduced by all other conduct and causes, by those who are not parties, that contributed to the cause of his accident. It does not matter that those people would be innocent, negligent, anything. All it requires is causation, and the plaintiff's damages are reduced by all other causes, and by

those who are not parties. Then the plaintiff's damages are further reduced by the full extent of all work comp benefits paid and to be paid in the future because of the provisions of section 9 and section 10. Essentially, a manufacturer is responsible for only its limited percentage of fault, and the plaintiff or the injured claimant or the heirs of the deceased claimant have offset against them and in favor of a negligent manufacturer all causes by people that are completely innocent in bringing about any harm to the plaintiff.

Thank you very much, Mr. Chairman, for your time.

[The statement follows:]

STATEMENT OF CHARLES B. O'REILLY

INTRODUCTION

In the proper exercise of the states' Constitutional right to enact laws for the protection of their citizens and property, almost all states have adopted product liability laws. These laws invariably included principles of strict liability.

The legitimate state interest protected by these strict liability principles was and is the health and welfare of its citizens. The public policy underlying strict liability principles recognized that strict liability provided the only fair and equitable means to (i) compensate the victims, and (ii) provide financial motivation for industry to consider safety.

When the various states adopted strict liability principles of law, they recognized that traditional negligence principles were inadequate in protecting the state's legitimate interest in the health and safety of its citizens.

Traditional negligence principles posed an almost insurmountable burden for most victims in attempting to enforce their rights to obtain redress for their damages. Insomuch as traditional negligence principles incorporated the "reasonable man" standard, the manufacturer of a defective product would only be responsible when it (i) knew in advance of the defect and the magnitude and likelihood of the danger created by the defect, and (ii) was aware of already existing safer alternatives.

As a result, traditional negligence principles provided an incentive for industry to minimize testing and research for hazards created by its products. Moreover, traditional negligence principles also rendered it unwise for a manufacturer to vary from the design of the other manufacturers in the same industry.

Under traditional negligence principles, a departure from an inudstry practice or custom would deny that manufacturer the ability to claim that its design was reasonable because the design complied with industry standards.

Traditional negligence principles also provided a motivation for industry to curtail any advancement in product safety. Under traditional negligence principles, the less a manufacturer knew of defects and dangers created by its product, the less the manufacturer's financial exposure to victims.

In addition, under traditional negligence principles, it was wiser for industry to restrict any reserch into safer alternatives or safer substitutes. The lack of any advancement in safety rendered it difficult, if not impossible, for a victim to produce evidence of available safer alternatives. If a manufacturer conducted research into or testing of safer alternative designs, it thereby ran the risk of providing the plaintiff with evidence of "practical technological feasibility."

Accordingly, the application of traditional negligence principles provided an impetus for industry to completely ignore safety considerations. Any manufacturer that gave consideration to safety in design ran the risk of "digging its own grave", and possibly the entire industry's grave, since safety advances would arguably provide notice to the industry of dangers in its designs.

Therefore, traditional negligence principles, in essence, allowed industry to completely control safety advances and provided an incentive for industry to "stand still" in the area of safety.

However, by adopting strict liability laws, the states could protect the health and safety of their citizens, inasmuch as strict liability provided impetus to industry to consider safety. Strict liability principles posed increased costs to the manufcturer for ignoring safety. They also provided substantial financial incentives to industry to conduct testing and research to determine the hazards and remove or reduce those hazards.

In addition, strict liability principles recognized the impossibility of the victims' burden of proof under traditional negligence principles. By allowing a victim to recover upon proof of a defect and causation, strict liability provided the victim with a fair opportunity to obtain redress for damages.

As a corollary, strict liability laws also represented an increased cost to industry if it refused to emphasize safety.

The asbestos scandal provides an apt illustration of the validity, efficacy and necessity of the public policy underlying product liability principles, in particular, strict liability.

No one can doubt that asbestos products constituted one of the most dangerous products ever placed on the market. The number of individuals who have died in the past or are presently suffering from asbestos products is in excess of a million people. Moreover, the estimation of the number of people who will suffer or die in the future from past exposure to asbestos ranges from tens of thousands to millions.

From the early 1900's until the middle 1970's, asbestos was used in a wide variety of products, with the various uses of asbestos increasing steadily until the early 1970's. However, corporate documents of the major manufacturers of asbestos products disclose that, in the late 1960's and the early 1970's, the asbestos industry began developing substitutes for asbestos in various products. These documents also disclose that the major factor that caused industry to develop substitutes was the potential expense of strict liability litigation by the victims. As a result of this potential financial cost, industry developed substitutes for asbestos, recognizing that continued use of asbestos in products would be financially foolish.

Today, the use of asbestos has been practically eliminated and, as a consequence, hundreds of thousands, and perhaps millions, of people will in the future be spared the ravages of asbestos disease.

It is recognized that the asbestos litigation has created concern about court congestion and has produced claims that the present system is, therefore, inefficient to deal with the asbestos problem.

Whatever may be the argument for or against the claims of inefficiency, it is also recognized that it was the staggering number of asbestos disease victims that strained court systems whose budgets and allocated resources did not anticipate the widespread asbestos disease and the litigation resulting therefrom.

However, the burdens imposed on the court systems does not represent a flaw of product liability principles. On the contrary, it represents the inability of the various legislatures to anticipate the extent of asbestos disease and the burden it would pose on court systems with limited resources.

In any event, if one had a choice, one would prefer the problems created by congested court systems to the problems created by an overburdened medical profession.

Products liability principles made the asbestos litigation and, to a certain extent, this litigation has burdened the court systems. However, these some principles, by industry's own documents and testimony, caused the removal of asbestos from the marketplace and, accordingly, prevented additional asbestos disease and death.

Of utmost importance, however, is the recognition that the application of traditional negligence principles would have exonerated the asbestos industry from fault, and the potential financial cost to industry posed by product liability principles would not have existed. The removal of asbestos would not have occurred, since the financial incentive would have been non-existent in the late 1960's and early 1970's.

It is also important to note that the referenced inadequacy of traditional negligence principles in asbestos litigation is unrelated to the application of statutes of limitation. Rather, the inadequacy exists because traditional negligence principles rely on the inadequate principles of "known dangers", "technological feasibility", "industry custom and practice", "reasonable man standards", and other factor which have rendered it difficult for victims to meet their burden of proof.

While the asbestos litigation provides an illustration of the importance and needs for strict liability, it is not the only situation where traditional negligence principles do not adequately serve a state's legitimate interest in the safety and health of its citizens. The emphasis on safety created by strict liability has been demonstrated in many industries, including the punch press, tire, automotive and other industries.

STATUS OF STRICT LIABILITY

As a consequence of the inadequacy of traditional negligence principles to properly cope with the capacity of mass produced products to cause widespread injury and death, many states adopted strict liability principles to provide a remedy for the victims and a financial incentive to profit oriented industry.

The strict liability principles adopted by the states are remarkably similar in their definition of strict liability. While there are some variations between some states in the definition of strict liability, for the most part, the substance of strict liability principles are fairly similar from state to state.

However, there are many variations between the states in local procedural laws, rules of evidence, rules of discovery, rules governing the conduct of trials, rules on damages, rules on presumptions and allowable inferences, etc.

Accordingly, the prosecution of a strict liability case in one state may vary from the prosecution of a similar case in another state. The difference in results from state to state is more probably due to differences in procedural, evidentiary and trial rules than in differences in the substance of strict liability law. Moreover, each jury is different and two separate juries hearing similar evidence can come to different results without indicating an unacceptable flaw in the jury system.

Even if the differences existed between the states in their definition and application of strict liability law, such differences would not justify a repeal of strict liability in the name of uniformity. Other than criminal laws prohibiting homicide, one cannot imagine a law more important than strict liability in protecting the legitimate state interest in the health and safety of its citizens. Moreover, states have coexisted for decades with vast differences between their laws on crimes, trusts, contracts, wills, evidence, property, estates, domestic relations, corporations, etc.

The importance and success of strict liability laws in motivating manufacturers to address safety has been documented by many industries. The machine manufacturing industry, the automotive manufacturing industry, the tire manufacturing industry, the building materials industry, and the drug industry are but a few that instituted safer designs in response to the potential costs of products liability litigation. To the extent that strict liability principles are eroded, the financial incentives to industry will be lessened and the resulting de-emphasis on safety will occur.

ANALYSIS OF S. 44

The Product Liability Act, presently pending before the Senate Commerce Committee of the United States Senate, is premised on a claimed need for uniformity. Recognizing that tort law has traditionally been a proper exercise of the states' police power, the proponents of the Bill justify the Bill's intrusion into the states' police power by alleging burdens on industry due to variations in strict liability laws between the states.

The various industries claim that interstate differences in the definition and application of strict liability principles place the manufacturers and sellers of products in an untenable position. It is alleged to be impossible for manufacturers to design and manufacture a product that will be considered non-defective in all fifty states. Therefore, it is argued, the United States Congress should implement a Bill that would provide one product liability law that would be mandatory in all fifty states. With one uniform law governing a manufacturer's liability for damages caused by its product, it is argued that certainty would be restored. Industry would no longer have to confront situations where a product would be defective in one state and not another.

While there is ample data indicating that different results in strict liability litigation from one state to another are far more the result of other factors than differences in strict liability principles, this statement addresses the woeful inadequacy of the Bill rather than the claimed need for uniformity.

In essence, the provisions of the Bill repeal common law principles of justice that have been developed and refined over the years in the exercise of the states' police powers. The Bill replaces these common law principles of product liability with obsolete traditional negligence principles.

It should be remembered that, in development of the law of strict liability, the various states recognized the inadequacy of traditional negligence principles in properly protecting a state's interest in the health of its citizens. Now, in the name of uniformity, the proponents of the Bill desire to return to principles of law already determined to be inadequate in protecting against mass produced articles of the technological age.

Most states' strict liability laws focus on the product and not the conduct of the manufacturer. The laws invariably provide that the victim has to prove that his or her injury was caused by a defect in the product that existed when a product was placed on the market. "Defect" is invariably defined by state law as an element of the product that made the product unreasonably dangerous, i.e., the risk of harm outweighed the benefits. Since the focus of strict liability law is on the product,

strict liability does not require proof of actual of constructive knowledge of the danger on the part of the manufacturer.

By focusing on the product and not on the manufacturer's fault, strict liability law motivates the manufacturer to properly test and design its products in order to discover and remove dangers. Furthermore, by focusing on the product and not on the fault of the manufacturer, strict liability minimizes reliance on industry custom and practice, and, in essence, prevents the industry from maintaining minimum or non-existent safety practices.

In addition, strict liability motivates manufacturers to research and design safer products. Since the focus is on the product, the failure of industry to develop safer designs does not exonerate the manufacturer. Under strict liability principles, the benefit-risk analysis incorporates state of the art. State of the art encompasses what could have been designed, with emphasis on the risks and benefits of safer designs. On the other hand, traditional negligence principles emphasize what was then available on the market as safer alternatives. As a result of the "reasonable man" standard, the application of traditional negligence principles to product litigation institutionalized industry ignorance.

Under traditional negligence principles, industry found security in ignorance. The less industry focused on testing, research and safer product development, the smaller its potential financial exposure and eventual cost in products litigation. In terms of safety, the closer industry was to the stone age, the higher its profit. This was and is not a criticism of net profit orientation, but rather a recognition of the undesirable consequences of profit oriented thinking.

Strict liability law was a belated recognition of the consequences that followed from the application of traditional negligence principles to profit oriented manufacturers.

The simplicity of the rationale behind strict liability belies its importance in preventing injury and death. The rationale of strict liability is that safety will prevail when safety is profitable. When the potential costs of products litigation may equal or exceed the cost of safety, industry will initiate safety to lower costs and increase profits.

Section 5(a) of the Bill delineates the circumstances under which a manufacturer will be liable for a manufacturing defect.

Under present law a manufacturer is liable when the product deviates from the norm and the deviation causes injury.

Under Section 5 of the Bill, a manufacturer is liable only for a material deviation. The inclusion of material deviation takes the focus from the product and places it on the manufacturer. The manufacturer will not have to be concerned about injuries caused by non-material deviations (whatever each of the fifty states defines "material" to be). In essence, the manufacturer will only be responsible when the deviation is large enough that it should have been detected. This standard will motivate the manufacturer to remove the financial cost of strict quality control which strict liability inspired. Less quality control means less quality, more deviation and more injuries. It allows industry to be in exclusive command of quality control. Whatever deviation industry allows will surely be evidence of non-materiality. Not only will many seriously injured people go without redress, but quality control will be weakened, creating more injuries.

Section 5(b) of the Bill defines the circumstances under which a company will be liable for a defect in design. Here the Bill specifically restores traditional negligence principles, which motivate the manufacturer to ignore safety completely. By expanding the reasonably prudent man into the reasonably prudent manufacturer (same or similar circumstances), these provisions compel companies to approach an industry wide custom and practice.

When Section 5(b)(1)(B) is considered with Section 5(b)(1)(A), one can foresee that profit oriented companies will adopt an industry wide custom of minimal research and testing along with an industry wide design.

By focusing on the manufacturers' conduct and notice, the provisions place a premium on industry compliance and ignorance of hazards.

In addition to the tremendous reduction in litigation costs and the concomitant de-emphasis on research that would result from Section 5(b)(1)(A) and (b), other subsections reduce even further any motivation towards safety by providing a manufacturer with an absolute defense when a safer design was not available on the market. This provision on feasibility penalizes safety advances, which, in turn, will foreclose any advancement. Why should an industry develop or assist in developing a safer design when the existence of the design will deny a company an absolute defense?

In addition, Section 5(b)(2) provides a complete defense whenever the victim is contributorily negligent for not possessing sufficient knowledge of the inherent dan-

gerous characteristics of the product. This provision would defeat most cases that are meritourious even under the obstacle created by Section 5(b)(1)(A) and and (B). Accordingly, even though other provisions of the Bill state that comparative negligence applies, this subsection provides a complete defense by using contributory negligence. The remaining subsections also provide a complete defense whenever a reasonable manufacturer would have place a dangerous product on the market. "Unavoidably dangerous" is defined in such a manner that asbestos would be considered non-defective.

Section 6 defines the law on warnings and essentially provides for liability only when a reasonable manufacturer would have knowledge of the danger and would have provided a warning. These provisions motivate the manufacturer to cease all testing for dangers (constructive knowledge of danger requires some testing or accident history) and to conform to minimum industry standards on warnings. Furthermore, the victim's burden on causation further lessens the manufacturers' potential exposure in litigation, and thus incentives for safety.

The subsections defining adequate and post-manufacture warnings render the manufacturer's duty to warn non-existent, and would have allowed the asbestos industry to avoid warnings altogether.

Not only is the reasonable manufacturer standard applies to the manufacturer's duty to warn, but the reasonable man standard is applied to the foreseeability of the effect of the warning.

The victim can recover only if he or she establishes that

(i) the manufacturer had constructive notive of the danger;

(ii) a reasonable manufacturer would have warned; and

(iii) it was reasonably foreseeable to the manufacturer that the warning would have led the product user to alter the manner of using the product.

Accordingly, Section 6 imposes a greater burden on the victim than even traditional negligence principles.

Additionally, other subsections specify factors which provide a complete defense to the manufacturer in a variety of circumstances that, under present law, would be irrelevant or at most a factor to consider in determining the plaintiff's comparative fault.

For example, if the danger would be apparent under a reasonable man standard, there is no duty to warn. In essence, unsophisticated uses would be entitled to no warning and this is the group that historically most needs warning.

Furthermore, there is no duty to warn of known dangers, even if a reasonable manufacturer would have warned, when there is product misuse or alteration that is not within the parameters of "reasonably anticipated conduct".

Section 8 of the Bill abrogates liability of a product seller that presently attaches under strict liability to those in the chain of distribution. Instead, a seller is liable under active negligence principles only for failing to discover a defect that would have been apparent in a reasonable inspection. This theory requires that the seller have a reasonable opportunity to inspect, which is rarely the case in mass produced goods.

Section 9, for all intents and purposes, diluted joint and several liability to the point that it is almost inapplicable.

Under the Bill, the claimant's recovery is reduced by his or her own conduct as well as the conduct of all other persons who are not parties. In addition, the claimant's recovery is reduced by other causes allegedly contributing to the claimant's damages.

Additionally, product misuse, alteration, etc. by others are also factors to be considered in reducing the claimant's damages.

The negligent manufacturer is responsible only for its percentage of responsibility, with the percentage of responsibility of all non-parties and causes being borne by an innocent claimant.

In addition, by the wording of the provisions, a claimant is penalized if his injury is caused by negligence of a third party concurrent with a product defect. By joining the negligent third party in the action against the manufacturer, the negligent third party receives the benefit of Section 9, in particular, abrogation of joint and several liability by the reduction of claimant's damages for the conduct of non-parties or causes.

Most jurisdictions do not allow an injured person to file two or more separate law suits for the same injury or damage. For example, if a person was injured as a result of the negligent operation of a crane in conjunction with a defect in the crane, state law requires the injured person to file only one action against both the negligent operator of the crane and the manufacturer of the defective crane. As a result, when a person is injured as a result of both the negligent conduct of a third

party and the defective product of a manufacturer, common sense will require, in many such cases, that the manufacturer not be named as a party to the action in order to avoid the application of Section 9. Accordingly, in an action solely against the third party, state law would allow the injured claimant to recover his or her entire damages, minus only his or her own comparative fault.

Therefore, to avoid the drastic provisions, the claimant will either attempt to file two separate actions or proceed only against the negligent third party. To join the product manufacturer and seller in the same action would cause a reduction of plaintiff's damages for the conduct of all persons who are not parties and all other causes.

As a result, this section completely emasculates joint and several liability, even for parties who are not manufacturers and sellers. Moreover, the entire burden of the conduct of all others is placed on the injured person. So, while the section gives lip service to joint and several liability law, the provisions thereof completely abrogate that law.

Section 10 defines the effect of a work related injury. In that event, the claimant's damages are further reduced by the total of all amounts already paid, as well as the present value of all workers compensation benefits projected to be paid in the future. Therefore, the negligent manufacturer is entitled to receive credit for all workers compensation benefits paid and to be paid, without consideration of any fault or conduct on the part of the employer or a co-employee.

In addition, a determination as to the amount of benefits paid or to be paid is not binding on the employer or workers compensation carrier. As a result, a claimant could have his or her damages reduced by estimated past and future benefits in the amount of $500,000 by the trier of fact. Yet, that claimant could thereafter be awarded only a total of $100,000 in his or her workers compensation action, with no recourse to recover the $400,000 from the beneficiary, i.e. the product manufacturer.

As with the other sections of the Bill, the injured person is severely penalized by the imposition of responsibility for all conduct by non-parties, as well as all causes that contribute to the damages. Any and all possible inequities and risks of incomplete justice are totally and completely assumed by the claimant, even an innocent one, while the negligent manufacturer of the product that caused the injury or death is burdened with none.

The provisions of the time limitation on liability also reflect the approach to resolve any and all doubts in favor of industry, and against the injured person. While the injured person is limited to seeking damages for an accident that occurs less than twenty five years from the date of delivery (this guarantees a maximum life of safety features of 25 years while the product may have a useful life of fifty to seventy five years), the manufacturer has no such limitation on its right to contribution or indemnity.

Section 12 covers punitive damages. The subsection requires that there will be at least two trials in every case where punitive damages are sought. A claimant must first prevail on his cause of action for negligence and then proceed to another trial, where much the same evidence will be presented on punitive damages. The second trier of fact can only determine whether or not punitive damages should be awarded. Thereafter, a third proceeding will occur, where the Court receives evidence on a number of factors. When the Court determines the amount of punitive damages, it must then issue findings of fact, etc.

In essence, three separate trials are required, which imposes a burden that will discourage most punitive damage cases. In addition, the plaintiff cannot be awarded punitive damages that exceed the compensatory damage award. As a result, no profit oriented attorney will prosecute a punitive damage case.

Moreover, the standard for the imposition of punitive damages is so severe as to render any recovery impossible. In addition to requiring an intent similar to that required for some crimes of homocide, the section requires the consideration of factors which ignore the public policies underlying the principles of exemplary damages. The provisions also allow a manufacturer to produce evidence of subsequent design changes on the punitive issue, while another section prohibits the injured party from introducing such evidence to prove defect.

CONCLUSION

The proponents of the Bill claim that the Bill will reduce the differences in decisions and results that are claimed to result from different state laws on strict liability.

The Bill will, indeed, reduce the occurrence of different decisions and results, but not because of uniformity. The Bill will accomplish such a result by, for all intents and purposes, eliminating product liability actions.

There can be no difference between results if there are no results or decisions. Moreover, the emasculation of strict liability principles removes the incentive for safety so necessary in a technological highly industrialized society.

The Bill guarantees a return to a time of the complete failure on the part of industry to consider the safety of its products. Once again, safety will be a "loss leader" and, for all intents and purposes, ignored. One might find some security in assuming that a de-emphasis on safety in the future is speculation. However, the corporate documents and upper management testimony obtained in strict liability litigation across the country, effecting a variety of industries, conclusively establishes this as a regrettable fact. Strict liability litigation and its attendant costs forced industry to emphasize product safety in order to maximize profits.

This Bill, beyond dispute, removes the only effective deterrent to hazardous products. To insure uniformity of decision, the Bill does not standardize the law, it abrogates it.

Senator KASTEN. Our next witness this morning is Mr. Richard M. Goodman, Detroit, Mich.

Mr. Goodman.

Mr. GOODMAN. Thank you, Mr. Chairman, and members of the committee.

I believe that this particular law does two basic things that disturb and concern me, and of course the clients that I have represented in the past and the future. No. 1, it destroys the cause of action of literally hundreds and thousands, I believe, of claimants presently pending in the courts of the States of the United States. And second, this bill has been drafted in such a way that it is fundamentally unworkable in major respects.

I do not know who is responsible for the drafting of this bill, but whoever drafted it had no firsthand understanding of the trial process that goes on in the courts of our States around this Nation. There is no question about that in my mind.

With respect to the claims that are being destroyed by this bill, I would just point out a few areas of concern. No. 1 is the very familiar DES cases that have been now recognized in many States, or it was recognized by the Michigan Supreme Court about 2 years ago in the case of *Abel* v. *Eli Lilly.* In this case our court held that where claimant who have contracted adenocarcinoma as the result of maternal ingestion of diethyl stilbesterol cannot prove by a preponderance of the evidence that the particular manufacturer supplied the drug in question, they may sue and recover from manufacturers, even in the absence of such proof.

Now, there are literally thousands of such women around in this country today, many of them who have brought suits, many of them who will bring suits. This bill will outlaw those claims, as I see it, particularly section 5, and the preponderance of evidence rule with regard to proximate cause.

The construction and manufacture provisions of this bill, section 5, page 9 of the bill, completely altered the law with respect to what a defect is and the burden of proof on the plaintiff imposed as it presently stands. The committee will consult the case of *Glick* v. *White Motor,* 458 Fed Second 1287. You will see that under the law as it presently exists in most jurisdictions around this country, the plaintiff will prevail if he shows a defect in the construction of the product. As defined by this bill, this is no longer the case, as I see

it, because the plaintiff must show deviation from plan or specification.

Many defects are not a deviation from plan or specification, because the plans or specifications make no reference to the particular area of defect involved in the case. That was true in the *Glick* case.

The idea injected in section 5 on construction defect about deviation, the requirement that the product be deviation from identical products is ridiculous. There is no such thing as identity of products. Almost every product can be distinguished one from the other. The bill does not say substantial identity; it says identity. If this construction defect provision is enacted into law, a majority of the defect cases which are not controversial at the present time are going to be destroyed, and plaintiffs are going to be denied access to courts of law on defect, which is not really a controversial issue today.

Third, the comparative fault provisions of this bill in section 9 are absolutely unworkable and in my mind unjust and ridiculous. If anybody has ever tried to try a lawsuit in which the defendant points to an absent party and says the U.S. Government, for example, or the State of Michigan is the real culprit here, and then the plaintiff is placed in the position of saying, oh, defending the absent party and getting the jury to understand that this absent party, who we do not defend or represent, is the real culprit in this case. This is unfair. This is completely unfair and unworkable. We are defending the interest of a party who is not present and who cannot be sued in many cases—an impossible situation, as I see it.

One other thing as far as unworkability. This bill is unworkable in so many provisions that even if I had an hour, I could not begin to outline them. But just to take one, the provision in section, I believe it is section 8 of this bill, about product sellers, there is a provision that says if a product seller—if the plaintiff sues the manufacturer and the manufacturer is unreachable because of the unenforceability judgment against a product seller, against the manufacturer, then the seller may be treated as if it were the manufacturer.

Now, just think about this. This requires the trial judge to make the determination that the product manufacturer cannot be enforced against. A judgment may not be enforced against the product manufacturer. How does the judge make such a determination? This is ridiculous. Does he make it at the time of trial when Chrysler may be, let us say, in chapter XI? How about after the verdict when Chrysler is back on its feet? What happens to the verdict that is rendered against the retailer in the meantime? It is voidable. And is this a question of fact, this issue of unreachableness or unenforceability of the judgment against the manufacturer? Is not somebody entitled to a jury trial on that issue? This is completely bizarre and not really workable in a court of law.

This bill, in my judgment, members of the committee, is completely unworkable, and it has been—I do not know how—but it has been drafted by people who do not understand the trial process that we all deal with on a daily basis. I have never seen this bill before.

Senator KASTEN. Thank you, Mr. Goodman.

Mr. GOODMAN. Thank you, Senator Kasten.

Senator KASTEN. The next witness is Mr. Victor Schwartz, counsel to the Product Liability Alliance.

Mr. SCHWARTZ. I am always intrigued when I hear a lawyer say that S. 44 is unworkable. Under the present system, lawyers are getting more money than victims in product liability. We have 51 sets of rules that change every day. It is true that some States are coming closer to the rules set forth in this bill, and the Supreme Court of Texas recently has done so, but other courts have not done so, and the gap between different States has broadened.

We have reviewed the product liability files in our law firm. We represent many different people. The briefing and rebriefing of issues spawned by the confusion of product liability law could be reduced by about 30 percent in cost if one set of product liability rules was operative in the United States. I think there has been a lot of confusion about this bill because people have not always read the latest version.

For example, one of the witnesses stated that joint and several liability is abolished. Specifically, on page 27 the bill says that joint and several liability shall be determined in accordance with State law. There is no change in joint and several liability law at all.

Recently an attorney general named Abrams from New York wrote a letter to the New York congressional delegation outlining about 12 different charges against S. 44. Not one of the charges was based on the actual content of S. 44 and Congressman Frank Horton answered him and demonstrated this fact, I would ask that that exchange of letters be entered into the record to help alleviate the confusion in the bill.

Senator KASTEN. Without objection, so ordered.

Mr. SCHWARTZ. Congressman Horton read the actual bill. There were criticisms of prior drafts raised by consumer groups and as a result of discussions between yourself and Senator Gorton many of them have been eliminated. For example, the bill did not deal with the major problem victims have today, particularly asbestos victims, in a number of States. Their rights to sue are barred, even though they neither knew nor had reason to know of their injury.

A recent State in which this occurred is Indiana, in the *Brazwell* decision. This bill has adopted a very broad discovery provision. This means persons will have a right to sue until they know or have reason to know both the harm and its cause. This will benefit victims in toxic tort States. In over 6 years in New York consumer groups have lobbied for such a bill, and they have lobbied unsuccessfully.

In one stroke of the pen, this will become the law of the United States. In terms of negligence law, I do not recognize the negligence law some of these other witnesses are talking about. S. 44 contains the strictest, most severe negligence standard imaginable. It is taken right out of the restatement of torts. It is what the restatement of torts suggests should be the appropriate rule and design standards. It says that you should exercise the judgment that society requires of its members for the protection of their own interests and interests of others. It says nothing about putting the standard of liability in the hands of a manufacturer.

This bill takes a progressive road that only one State in the United States has gone down so far. If you design a product today and there is no other way to make it safer, many States say your only obligation is to warn about the risk connected with this product. This bill says, in effect, you can be found liable if you design a product, even if there is no other way to make it safer if you put forth that product on the market.

The fact that current technological feasibility is the only way you can do it will not bar your claim. The warning provisions of the bill are very strict. It does not talk about necessary warnings, but adequate warnings which must be detailed. It is true that in the bill, certain products that have intrinsic characteristics or inherent characteristics that cannot be changed do not subject people to liability. Knives cut. Stoves burn. Such products do not create liability, but any product that has a defect brought about by negligent conduct is going to subject its manufacturer to liability.

By manufacturers having a clear standard, holding them liable when they are at fault, that they have to exercise the highest prudence, will result in manufacturers knowing what is expected of them instead of the confusion that we have today where some States tell them if they improve their products that will be used against them, and other States tell them it will not be. Some States tell them to warn about things that are obvious, and other States tell them if they do that that can be used against them and make them held liable.

By having one set of uniform laws, there will be an engine for safety that is clear to every manufacturer and product seller in the United States. We also will help reduce the horrendous legal costs that all clients are paying today both on the plaintiff's side and the defense side.

Thank you very much.

[The statement and letters referred to follow:]

STATEMENT OF VICTOR E. SCHWARTZ

Thank you very much for your kind invitation to testify about the major changes made in S. 44, the Product Liability Act, as the result of negotiations between Senator Kasten and Senator Gorton in S. 44. As counsel to The Product Liability Alliance and as Chairman of the Federal Interagency Task Force on Product Liability, I have followed the development of this legislation very closely. The most recent changes made in S. 44 are significant and, in substantial part, meet the concerns that consumer and labor organizations raised in their testimony about prior versions of S. 44.

Let me share with you the changes that appear to be most significant. First, at the suggestion of some professors and consumer groups, S. 44 now incorporates a "discovery" statute of limitations. This will provide immediate protection for persons injured by products—protection that is not available under the law of a number of states, including New York and South Carolina. In these states, the statute of limitations begins to run at the time a person is initially injured. Unfortunately, with respect to asbestos and some chemicals and pharmaceuticals, "the time of injury" may be the time of exposure to or ingestion of the product. Yet, the claimant's harm is not debilitating or recognizable until long after ingestion or exposure. Under such a "time of injury" statute of limitations, the injured person's claim is barred even before he knows he has been injured. Under S. 44, the limitations period will not start until the claimant discovers both his harm and the cause of that harm. This is one of the broadest discovery rules available, giving the claimant one of the longest periods of time in which to bring an action.

Many concerns were raised by consumer groups about the manner in which the design and warning liability standards of S. 44 had been drafted. The Kasten/

Gorton compromise, the touchtone of liability in both warning and design cases is whether the defendant exercised "reasonable prudence." This standard requires conduct of the ideal reasonable person and the "judgment that society requires of its members for the protection of their own interest and the interest of others. . .". This high standard of conduct obviates the concern raised about earlier versions of S. 44 that somehow the bill would permit an industry to set and control the standard of liability against which its liability would be measured.

A second concern was that no liability could be imposed under the design standard unless knowledge about the design danger was "reasonably accepted in the scientific, technical or medical communities." Some consumer groups felt that this requirement would allow manufacturers to remain ignorant of product dangers and, thus, avoid liability or that the amount of proof needed to establish that the learned community "accepted" the fact that there was a product danger woud be unusually high and burdensome for the claimant. Under the "exercise of reasonable prudence" standard now in S. 44, these concerns are resolved by requiring manufacturers to exercise due diligence to learn of product dangers. The bill contains a further protection for consumers: it places a continuing duty on the manufacturer to discover product dangers. This continuing duty is extremely foggy and unclear in the law of many states.

Under the law of many states, manufacturers can avoid liability for harms caused by products that have marginal utility but cannot be designed any other way. Under S. 44, a negligent defendant will not be able to excuse his conduct merely by showing there was no alternative design. This obligation goes beyond the obligation to warn of risks created by such products.

The earlier versison of S. 44 required manufacturers to make "necessary warnings" about products. Some consumer groups were concerned that the reference to "necessary warnings" was too limited, because it suggested that there was a duty to warn only where absolutely necessary. S. 44, following the law of more claimant-oriented courts, now require that manufacturers must provide "adequate warnings" about product dangers. This ensures not only that manufacturers provide warnings, but also that their warnings are adequate in detail.

The earlier version of S. 44, again following the law in many states, judged a manufacturer's warning at the time the product was made. The Kasten/Gorton revision of S. 44 follows a more claimant-oriented rule. Now, the manufacturer's conduct about warnings is judged after the time of manufacture—at the time the product left his control. Even though this may require some new warnings about dangers discovered after a product was made but before it left the manufacturer's control, the obligation will be imposed.

A number of consumer and labor groups raised concerns about the fact that S. 44 abolished offensive collateral estoppel. Although all members of The Product Liability Alliance, as well as many legal scholars and practitioners, believe that collateral estoppel promotes rather than reduces litigation, and, thus, should be abolished, there are grounds for disagreement. Senator Kasten and Senator Gorton agreed that S. 44 should be silent on the issue of collateral estoppel. They believed that if left to the courts and if fairly applied, collateral estoppell might reduce litigation.

Previously, S. 44 provided very clear guidelines about when a manufacturer could warn a person other than a product user, i.e., an employer, a parent, a supervising expert. Some consumer groups expressed the concern that these rules were too rigid. S. 44, as revised, provides a flexible rule in this area based on "reasonable prudence". If there is a very serious risk, the manufacturer must make an additional effort to warn the actual person using the product.

Product liability law in a few states has produced some absurd results by imposing liability on manufacturers for harm caused by misuse or alteration of their products. For example, a court in Maine required a manufacturer of a vacuum cleaner to pay for harm caused to a twelve-year-old who rode unclothed on the product because, according to the court, the manufacturer should have foreseen such a "use". To provide a clear rule for these cases, the earlier version of S. 44 required that manufacturers anticipate the conduct of "reasonably prudent persons." Harms caused by conduct that a reasonably prudent person would not undertake would not result in liability. Some consumer groups argued that this rule tilted the law too far toward manufacturers and that manufacturers should have an obligation to anticipate special classes of product users, such as children, handicapped people and the elderly, whose conduct with respect to the product might not be reasonable. S. 44, as revised, reflects this concern. Now, manufacturers must anticipate the conduct of the "expected, ordinary and familiar class of persons likely to use or be exposed to the product." This new approach resolves the problem of holding the manufacturer liable for the consequences of totally unanticipated misuses or alterations and at the

same time it requires the manufacturer to take steps to protect the ordinary class of persons who might not be deemed reasonably prudent in a pure objective sense—one fixed for an ordinary adult.

The earlier version of S. 44, following the overwhelming majority rule, said there was no obligation to warn about dangers that were "obvious", i.e., that gasoline burns, that glass breaks. Because this was regarded by some consumer groups as overly broad, the Kasten/Gorton version puts some limits on the rule. Now, S. 44 provides there is no duty to warn about dangers that are obvious provided that there is an appreciation of "the magnitude of the danger." This will assure that warnings are made where the nature of the danger or the extend of the danger is not as a practical matter obvious.

In earlier versions of S. 44 there was a provision, favored by many businesses, but opposed by labor, consumers and a noted authority on worker compensation, Arthur Larsen, who testified before this Subcommittee. The provision said that when an employer was a fault in causing an employee's injury, the portion of the harm caused by the employer should not be paid for by the manufacturer if a product liability suit arose out of the workplace incident. Under this provision, the injured employee would absorb the loss, because neither the manufacturer nor the employer, who is immune from liability for its negligence, would pay. The rationale was that the employee had through workers' compensation given up his right to sue his employer and that responsibility should not be placed on a manufacturer. The doctrine is called equitable apportionment. Labor groups argued, however, that it was more appropriate to have the product manufacturer, rather than the employee, absorb the cost of employer negligence. S. 44 was revised to reflect this change.

Labor groups were also concerned that S. 44 required workers to wait until a worker's compensation claim was completed before bringing a product liability action. This requirement was deleted from the bill.

A final major change in the bill occurred in the area of punitive damages. As Senator Gorton has pointed out, punitive damages do not exist in the State of Washington. The policy of that State and some others is to leave punishment to criminal law and not include it in tort law. S. 44 would permit the award of punitive damages in all States. Under the original bill, multiple punitive damages awards for the same conduct and product could be made—a practice that would be expressly forbidden under the United States Constitution if an action were brought under criminal law. As revised, S. 44 allows punitive damages to be imposed once with respect to a single course of reckless disregard for safety. Also, while preserving a claimant's incentive to bring such an action (by providing that some punitive damages flow to that claimant), S. 44 now provides that the damages be used for a public purpose. As will be made clear by other witnesses, punitive damages are not compensatory in almost all States—their function is solely to punish and deter.

There are many other changes in the bill that I have not discussed this morning—they will be set forth in a supplementary paper prepared by The Product Liability Alliance. The overall picture of the Kasten/Gorton revision of S. 44 is clear. It specifies a broad fault-based standard of liability for design and warning that never permits a manufacturer who could be deemed at fault from escaping liability. It also imposes a strict liability standard for construction and express warranties. It has carefully manicured defenses and permits injured persons to bring their claims without an arbitrary statute of limitations cut-off. In sum, it is not a bill that would be drafted by manufacturers nor is it a bill that a committee of plaintiffs' attorneys would draft. It is a fair and balanced series of rules. The uniformity it provides will substantially eliminate unnecessary legal costs and improve the system of justice in the United States.

STATE OF NEW YORK,
DEPARTMENT OF LAW,
New York, N.Y., January 3, 1984.

Hon. FRANK HORTON,
Member of Congress,
Rochester, N.Y.

DEAR CONGRESSMAN HORTON: The Senate is currently considering S. 44, the so-called federal product liability "reform" bill. It is my understanding that this legislation will be brought to a vote very early in the Senate upon reconvening. If the Senate passes the bill, a House version is likely to be introduced quickly. I urge you to oppose such legislation.

While it is impossible to comment on the House bill which has yet to be written, I have reviewed S. 44 in its current form. The following comments on that bill are

offered to alert you to the problems that similar provisions would pose should they appear in the House version.

The bill, if it were to become law, would do substantial harm to thousands of New York consumers. Its clear thrust is to shift significantly the burden of bearing losses resulting from injuries inflicted from dangerous products from the manufacturers and sellers to their consumer victims. This is particularly troubling since the existing tort law system appears to be functioning, with some exceptions, adequately in the product liability area. Those exceptions relate to anti-consumer provisions of some states' laws which make recovery in certain legitimate cases virtually impossible. The undoubted result of the shift in burden contemplated by this bill would be that many consumer victims with compensable claims under current law would not be compensated for medical care and support. Federal and state social services would likely have to pick up the costs of their medical care and support which properly lie with the manufacturer and seller. Further, there has been a lack of showing that this bill is needed.

The bill weakens consumers' right in many ways. Among our major concerns are the following:

A. ELIMINATION OF THE STRICT LIABILITY STANDARD FOR FAILURE TO WARN

The bill would weaken the prevailing standard governing the obligation to provide consumers with warnings on product use.

Currently the seller and manufacturer each have the obligation to provide sufficient warnings to enable the consumer to understand how to use the product without hazard. A plaintiff need not prove a negligent failure to warn on the part of a manufacturer. The bill would substitute for this strict liability standard a series of tests which would be even more difficult for the plaintiff to meet than those applied in traditional negligence cases. For example, a consumer would have to show that the manufacturer should have known, by material generally known and accepted in the scientific community, about the danger in question (§ 6(b)(1)). Also, the manufacturer would need only to conform its conduct to that of a "reasonably prudent manufacturer" rather than to that of a "reasonably prudent person" (§ 6(b)(2)). This weakening of the warning standard would eliminate much of the incentive presently provided by the law of strict liability, for manufacturers' safety research, and make it less likely, therefore, that consumers would be warned of dangerous products.

B. ESTABLISHING STANDARDS MORE STRINGENT THAN NEGLIGENCE STANDARDS FOR DESIGN DEFECTS

§ 5(b) of the bill would similarly impose on consumers injured by a defectively designed product a series of tests which are considerably more stringent than traditional negligence standards, thereby making these claims inordinately difficult to prove. For example, § 5(b) would require that a victim prove that the manufacturer should have known of the design defect based on knowledge which was reasonably accepted in the scientific community. Thus even if it would have been negligent to disregard certain scientific studies regarding a product defect, this provision would absolve the manufacturer if those studies had not yet achieved reasonable acceptance. Additionally, as with "warning" causes of action, the standard in design defect cases under this bill is to be that of a "reasonably prudent manufacturer" as opposed to the traditional negligence standard of "reasonably prudent person". This difference will likely be used to justify actions which are common industry practice but which would fail the prudent person test.

C. ELIMINATION OF THE FORESEEABILITY STANDARD

Traditionally, manufacturers have a duty to make their products reasonably safe not only for their intended use, but also for reasonably foreseeable uses. The bill would eliminate this duty by absolving defendants of liability whenever the product is used in a way inconsistent with warning, instructions, or reasonable practice of users of the product. (§ 20(a)(2)) The implications of this change are extremely far reaching. To give but one example, would manufacturers that fail to produce even minimally crash-worthy vehicles be absolved from liability in cases where the driver or passengers hit noncrashworthy parts of the car in the course of a collision since those parts' intended uses are other than to be crashed into people?

There are many other areas of concern as well. These include the elimination of joint and several liability, modifications of the Workers Compensation Law, the re-

strictions placed on obtaining punitive damages, and the modifications of well-established collateral estoppel rules.

Given the preemptive nature of this bill, the broad brush with which it paints, and its endorsement by an administration supposedly dedicated to a "new federalism", one would be led to believe that it addresses severe problems that are currently being ignored at the state level. But the truth of the matter is that while there are indeed some large awards and some variations in results among jurisdictions, no crisis exists. To the contrary, the present law is necessary to provide the minimal protection to consumers and should, if anything, be strengthened. Further, product liability insurance rates are relatively stable, if not declining. Juries appear to be, overall, fairly tough on plaintiffs in product liability cases.

The sweeping nature of this legislation in limiting consumers' legitimate rights, combined with the lack of showing that it is needed by manufacturers, leads me to urge you to work actively against such legislation should it be introduced in the House. It is, I believe, one of the most anti-consumer etforts to be seriously considered in Congress in many years.

If my office can be of assistance in working with you on this issue, please let me know.

Sincerely,

ROBERT ABRAMS, *Attorney General.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., February 1, 1984.

Hon. ROBERT ABRAMS,
Attorney General, New York State Department of Law,
New York, N.Y.

DEAR BOB: Thank you very much for your letter of January 3 providing me with an evaluation of S. 44, the pending Federal product liability bill. Your letter concerned me greatly, and I have looked carefully into the matter. I would like to share the following observations with you. I do hope that you will be pleased.

First, many of the concerns that you raise are no longer part of the proposed legislation. During September and October of last year, Senator Slade Gorton of Washington (a former attorney general of that state) and Senator Robert Kasten, a principal sponsor of the bill, engaged in a process that resulted in substantial revisions of the legislation. Those revisions helped assure that the bill is fair and balanced.

For example, the bill now includes a provision that will be of substantial help to many, many victims of asbestos or other toxic torts in the State of New York. Currently, the New York statute of limitations can bar a person's right to sue for toxic tort injury before he knows or has reason to know that he has, in fact, been harmed. See, e.g., Manno v. Levi (App. Div. July 11, 1983); Steinhardt v. Johns-Manville Corps., 54 N.Y. 2d 1008 (1981). As you know, consumer and labor groups have tried for many years, unsuccessfully, to change this rule, both in the New York courts and in the New York legislature.

Under S. 44, as revised, "a person's right to bring a claim will not be barred until two years after he knows or, in the exercise of reasonable prudence, should have discovered the harm and its cause . . . ." See Section 14. To give a specific example, let's consider an asbestos worker living in New York who may, during World War II, have worked in a shipyard in New York. If, unfortunately, he was exposed to asbestos dust in the shipyard and now discovers that he has mesothelioma, he will find that New York law totally bars his claim. Under S. 44, however, the person will have a right to bring a tort claim against appropriate parties.

Second, the bill provides pure comparative fault standards. While New York is one of the few states that has this advantage for consumers, most states do not. Pure comparative fault allows an injured party to recover if there is some responsibility on the part of the manufacturer or product seller. That provision of the bill may be of help to consumers in all states, including New York, because it also places assumption of risk under a comparative fault principle. In many states, and under the Restatement (Second) of Torts, a party who assumes the risk in a product liability case is totally barred from bringing a tort claim.

S. 44 is structured to provide incentives for safety so that consumers will not end up in product liability cases. For example, it provides a uniform rule that encourages manufacturers to make safe products by barring the introduction of evidence of product safety improvements in cases involving older products. As you are aware, almost all legal scholars that have studied this issue, from Wigmore on Evidence to

scholars in the present day, believe that this rule is appropriate. Unfortunately, it has been eroded in some states, including New York.

The bill also helps create incentives in the workplace by depriving negligent employers of their right to shift worker compensation costs onto product manufacturers through the vehicle of a subrogation lien. Further, it substantially cuts litigation costs (which do exist in New York) by barring manufacturers from shifting what are, in effect, "product liability" tort costs onto employers through contribution and indemnification actions.

You indicated concern about "elimination of strict liability standard for failure to warn." Extensive research has been done and shows that in almost every state fault is the basis for proving failure to warn. In most states, including New York, when it comes to failure to warn, there has to be a showing that the manufacturer either knew or should have known about a risk. Senators Kasten and Gorton agree with your concern that it would be inappropriate to hinge the knowledge element on knowledge that was "accepted in a scientific community." That provision was eliminated in the revision that occurred in October. The knowledge element now requires manufacturers to know that which they should have known in the exercise of reasonable prudence. Thus, a manufacturer must act with the "care, attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interest and the interest of others . . ." in its discovery of product dangers. See Section 2(4). The warning standard now in S. 44 is a very strong one and places firm incentives for safety on the manufacturer.

I agree with your concern that it would be inappropriate to establish "standards more stringent than negligence standards for design defects." The Kasten/Gorton revisions eliminate this concern. The bill is crystal clear that manufacturers will not be able to justify their conduct and escape liability by proving their conduct was consistent with "common industry practice." Again, the concept of "reasonable prudence" helps bring about this result.

You express concern about the bill's elimination of the so-called "foreseeability" standard. As you may know, under the rubric that manufacturers should be responsible for "foreseeable" misuses, defendants have been held liable when persons have placed hot air balloons in commercial washer/dryers, poured perfume on lit candles, or actually used ordinary vacuum cleaners as a toy to ride. In effect, the courts have imposed hindsight rather than foreseeability in evaluating manufacturers' liability. With hindsight, almost anything is foreseeable. The bill now holds manufacturers responsible for "reasonably anticipated conduct" of product users. Under the Kasten/Gorton revision, manufacturers and product sellers will be responsible for conduct that would be "expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." This will help assure that manufacturers will anticipate needs of the elderly, children, handicapped, and other persons who may not be expected to abuse products in an ordinary way.

Let me briefly address other areas of concern that you mention on page 3 of your letter. The bill does not eliminate joint and several liability but specifically leaves that concept to state law. *See* Section 9(g)(q) ("joint and several liability and contribution among joint tortfeasors shall be determined in accordance with applicable state law . . ."). The bill, contrary to the concern expressed in your letter, does not affect collateral estoppel rules. The modifications in worker compensation law do not reduce workers' awards, but instead place incentives for safety on employers and reduce litigation among employers and product manufacturers.

The bill's provision on punitive damages helps assure that manufacturers who engage in reckless conduct are punished, but are punished in accordance with their wrongful act. It prevents multiple exposure to punitive damages and avoids the unfortunate result of exhausting a manufacturer's assets before people who need to be compensated are paid.

I hope that the above observations will help assure you that the bill is not anti-consumer. Let me close with some key points about why the legislation is needed. Currently, manufacturers face a crazy quilt pattern of differing laws on product liability; nevertheless, they distribute their products in interstate commerce. Almost 30 states have attempted to address product liability through legislation, but as the late Governor Grasso of Connecticut, and the current Governor of Kansas, John Carlin, have observed, state product liability laws tend to limit the rights of individuals in the state without providing any predictability or guidance to product manufacturers. Data show that over 70 percent of goods are shipped out of the state. Unfortunately, states have not followed the course that they did follow with the Uniform Commercial Code. There is more diversity in product liability law today than ever.

This provides a substantial harm to consumers. Currently, over 18 percent of the price of a ladder is product liability insurance. This cost, in turn, is based on the mushrooming legal costs that permeate the product liability area. As hearings before the Senate Commerce Committee showed, currently $7.00 is going to lawyers for every $6.00 to victims. Much of this cost is based on researching, briefing, and arguing the everchanging and unstable product liability laws that exist throughout our state.

S. 44 is supported by a very broad base of Senators in both parties, wide geographic areas, and in all different shades of the political spectrum. It is one area where the Federal government, without cost, can help. Product liability, as the Administration has appreciated, is inextricably entwined with interstate commerce.

For these reasons, the Honorable Warren W. Eginton, the highly-respected judge of the United States District Court in Connecticut, testified before the Senate Commerce Committee that, "the proposed Federal product liability legislation will accomplish the primary goals of reducing transaction costs of all types and into all parties involved in product liability litigation." For this reason, he "strongly favors" S. 44 "from the viewpoint of a judge who would benefit from uniformity, both in the course of the trial and in the area of settlement before trial has to commence . . . ." *See* Hearings before the Subcommittee on the Consumer of the Committee on Commerce, Science and Transportation, 98th Cong., 1st Session, No. 98-33 at pp. 251-252.

For these reasons also, as you may be aware, on April 25, 1983 the New York State Senate passed a resolution asking that Congress find a product liability solution on the Federal level. See Hearings, Supra, at p. 256. In that regard, Senator Walter Floss of the New York State Senate submitted a statement to the Senate Commerce Committee urging prompt enactment of Federal product liability legislation.

I very much appreciate your bringing your concerns about the legislation to my attention. I think you will agree upon reading the Kasten/Gorton revision of S. 44 that it will benefit the citizens of New York as well as other states, that it will benefit those who purchase, use, manufacture and sell products.

For your information, I am sharing copies of both your and my correspondence with Senators Kasten and Gorton, as well as with the Members of the New York Congressional Delegation.

With kindest personal regards,

Sincerely,

FRANK HORTON.

Senator KASTEN. Thank you, Mr. Schwartz.

The committee will operate now on the 5-minute rule, rotating questions back and forth from the Senators. We are going to try to get through one or two rounds with this panel, and then we will go to the next panel, and then to the third panel. Hopefully we can complete this hearing some time before noon today.

I would like to begin by first of all reading, and this should count against my time, into the record a comment from Judge Eginton. We invited Judge Eginton to come here. He wrote us back, and he has testified before. Judge Pope, you might remember that the district court judge for the district of Connecticut was part of the panel that you were on last April.

He felt that it was inappropriate for him to be here today, but he sent a letter in support of S. 44 and the changes that have been made.

And I ask that the judge's letter be included as part of the record.

[The following information was subsequently received for the record:]

U.S. DISTRICT COURT,
DISTRICT OF CONNECTICUT,
Bridgeport, Conn., February 24, 1984.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Tranportation, Hart Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: You may recall that I made written and oral presentations to your Consumer Subcommittee in April of last year concerning the then current version of S. 44, the Product Liability Act. Your staff through the courtesy of Ms. Richmond and Ms. Rhode, have supplied me with a copy of the latest Staff Working Draft dated October 19, 1983. Professor Schwartz has asked me if I wished to appear before your Consumer Subcommittee next month at the hearings that will take place respecting the latest version of the Bill.

I find that it would be basically repetitive for me to make such an appearance, since I would merely reiterate opinions I expressed during the course of those 1983 hearings.

However, it probably would be appropriate for me to comment on the changes that are reflected in this latest Draft, made I understand by you and Senator Gorton during the past few months. My comments will of course be only from the standpoint of a judge whose strong belief is that uniformity assists the judicial process from the standpoint of certainty and economy. Transaction costs should be reduced, not only from the standpoint of a court, but also from the standpoint of litigants.

On the bases set forth above, I thoroughly approve the deletions that have been made in paragraph 4, "Responsibility of Manufacturers." I have from the inception of the legislation expressed my belief that old Section 4(b), providing for a threshold determination of a prima facie case, was entirely unnecessary. Judges never send a case to a jury, but uniformly dismiss on plaintiff's case, if a prima facie case has not been established. Accordingly, Section 4(b) was in my judgment a redundancy and I am pleased to see it deleted.

With respect to former Sections 4(e)(1) and (2), I am likewise pleased to see those deleted, because the doctrine of collateral estoppel is best left to the courts to apply and need not be encompassed in legislation. Accordingly, as to the deletions made in Section 4, I am happy to see the legislation thus shorn of clauses that were never required, in my judgment.

With respect to the changes made in Sections 5 and 6 of the legislation, I regard those changes as porobably positive. I had indicated in my comments on the earlier Drafts that in my opinion the judges would continue to apply the "reasonable" standard of negligence established through expert testimony regardless of what language might be used in legislation. I think that removing the test of "knowledge which was reasonably accepted in the scientific, technical or medical community" is probably a good deletion, since it placed emphasis on only one portion of a much broader yardstick by which reasonable conduct is measured. As for the new language which talks about "the exercise of reasonable prudence", in my judgment we will continue to apply the language that judges commonly charge anyway which is "knew or reasonably should have known." The language of the legislation is basically equivalent to that customary yardstick anyway.

The changes made in Section 9 with respect to the doctrines of misuse and alteration, and the doctrines of contributory negligence and assumption of the risk are probably helpful and certainly conform with the tests uniformly applied by judges in their charges to juries.

I am pleased with the inclusion of Section 14 in the latest Staff Draft because I think that a uniform statute of limitations is just as important as is the uniform statute of repose contained in Section 11, if forum shopping and transaction costs are to be alleviated.

Finally, with respect to punitive damages, I am fascinated by the convolutions of the latest version of Section 12. I am confident that there will be a great deal of comment and discussion about the proposed fiduciary trust fund to be established by the particular court involved with the litigation. I cannot speak for my fellow or sister judges on this issue because it is too new for any significant discussion to have taken place among us. However, my own view would be very much in favor of a national superfund so that the individual courts are relieved of administrative burden, and the money in excess of that allocated to the plaintiffs would automatically go to some office in Washington administering the superfund. I am confident in any event that exports in the punitive extensive input with respect to this latest version of punitive damages legislation.

In sum, my overall view of the October 19, 1983 Staff Working Draft is not basically different from the conclusions that I presented to your Subcommittee hearings in April, 1983. I believe that this legislation presents a prospect for more uniformity than now exists and, of balance, I strongly favor this legislation from the viewpoint of a judge who of necessity benefits from uniformity, both in the course of the trail, and in the area of settlement before trail has to commence.

As before, I would be most appreciative of you and your staff keeping me informed on developments as they occur with respect to this legislation.

Sincerely,

WARREN W. EGINTON.

Senator KASTEN. Mr. Goodman, I would just simply like to assure you that we do not intend in S. 44 to address the question of liability where a claimant cannot identify the manufacturer of a product which allegedly has caused harm. We leave that question and how to deal with that question to the States. In the original version of S. 44, there was a *Sindell* decision section. That section has since been dropped.

I would like to say to you that you had some comments about people that have been drafting this legislation. We would be happy to work with you to assure you that, No. 1, the *Sindell* decision in your reading of a prior draft of the bill has been dropped. It is no longer part of this legislation, and we do not intend for it to be part of this legislation, and we are happy to work with you or anyone else in that direction.

And in terms of asbestos, I want to assure people who are concerned about asbestos, that this legislation was drafted to establish general standards for liability in product liability actions. Nothing in the bill was designed to be specifically addressed to the asbestos problem that has come up in every one of our hearings. People have been talking about the problems. We sometimes get into the question of whether or not Johns-Manville ought to be able to declare bankruptcy. That is a question, but it is not something we are trying to deal with today or in any of the hearings we have held.

I want to assure you that this legislation was drafted to establish general standards for liability in product liability actions. Nothing in the bill was specifically addressed to asbestos problems; however, the provisions of the bill setting a time limit on liability for harm caused by capital goods expressly excludes injuries and disease that are latent and that are not manifest for a long period after exposure to a substance.

In addition, the new statute of limitations in the bill will in fact help victims who may not know of their harm or its cause for years from the time of exposure.

Now, I would like to just address a question to you, Mr. O'Reilly. It seems to me that we have two separate questions here, and one is a DES asbestos kind of a question in which the courts seem to be moving toward a compensation system, but I do not think anybody in the group has questions about the fact that there ought to be standards set so that people can know their rights and responsibilities and be able to insure against them, or to self-insure, or whatever.

Do you think that what we ought to do is to separate out some of the questions that you raised and consider a separate compensation bill of some kind?

Mr. O'REILLY. Thank you, Mr. Chairman. No, I do not, and I think that in answering that question I can illustrate a real problem with this bill. The reason I mentioned asbestos was not to talk about this bill providing some solution for the difficulty or delay that the victims now have in getting compensated. It is this. Under this bill, asbestos, while everybody knows it is a hazardous disease-causing product, everybody recognizes that, yet under this bill asbestos will not be defective under section 5.

There would be no duty to warn under section 6, and there would not be a practical technologically feasible substitute available, so the asbestos industry never would have had to develop substitute products. The asbestos industry's own memorandum from Owens-Corning Fiberglas, from Johns-Manville, from Raybestos Manhattan, 1969, 1970, and up to 1972 disclosed that it was because of the risk of exposure under strict liability which holds them to any danger whether they knew it or not.

Because of that risk of exposure they had to develop substitute products and get asbestos out of their products. One of the memorandums by Mr. Briley, corporate counsel and vice president of Owens-Corning Fiberglas, referred to the imminent threat of strict liability suits as the blitz. He said, we have to get a substitute available for when the blitz hits, and that is why the asbestos victims of America are so opposed to this bill, not because it claims uniformity, but because it standardizes at a very low minimum and unsafe level. It does not provide the incentive financially that the manufacturer needs to initiate research instead of removing the product after the medical profession 40 years later has done the body count.

Thank you, sir.

Senator KASTEN. Senator Heflin.

Senator HEFLIN. I had hoped that Professor Bepko could be here to address the issues of the Uniform Commercial Code. Maybe someone else can help in regards to it in his absence. One of the successes of the uniform movement in the States by the Commissions of Uniform Law and the ALI and various others was the adoption of the Uniform Commercial Code. And I suppose now practically every State has adopted the Uniform Commercial Code, bringing about uniformity in the commercial field, including sales. Under the section of the Uniform Commercial Code dealing with sales is the issue of express warranty and implied warranty which the various legislatures, through a uniform effort, have adopted. Yet I notice that this bill invades the effort on the part of States to achieve uniformity and seeks to usurp the States' efforts at uniformity in this area.

In reading this bill I see that they allow under certain circumstances causes of actions for express warranty, but that they specifically prohibit any implied warranty suits, which raises some question about whether or not it is just a special interest bill rather than a fairness bill.

The Uniform Commercial Code has the implied warranty of merchantability which means that a product is fit for the purpose for which it is sold. Based upon that warranty, there have been actions for breaches of implied warranty. However, as I read this act, the preemption clause preempts everything that the States have done

relative to expressed or implied warranty, and then only provides for suits for expressed warranty.

In that this bill would limit actions under the Uniform Commercial Code, perhaps, Mr. O'Reilly, you might elaborate a little bit on actions for implied warranty in the field of tort liability or contract liability.

Mr. O'REILLY. Thank you very much, Senator.

One, the point that the Senator made about the Uniform Commercial Code is a good illustration for how the august body of the Congress of the United States has seen fit to deal with situations where they believe there is some need for uniformity among the States. That was the opinion behind the adoption of the Uniform Commercial Code, and as I am sure the chairman and the Senator are well aware, the Uniform Commercial Code was not promulgated by Congress and made obligatory on the States. It was recommended to the States for them to incorporate provisions that they thought best suited their internal needs in each particular State.

As a consequence, almost all States adopted certain provisions of the Uniform Commercial Code, and then it enacted their own provisions based upon their own particular interests to implement a fair and reasonable commercial code in the State. One of the provisions retained by all States in the Uniform Commercial Code is implied warranty which allows an injured person to sue a manufacturer and/or seller when a product because of its very nature and the circumstances of the sale is impliedly warranted to be merchantable, that is, safe for common, ordinary uses, and safe for any particular uses that would be foreseeable to the manufacturer and seller. Otherwise, there should be a disclaimer of safety.

This bill basically very silently, without mentioning it, completely does away with the law of implied warranty that presently exists in 50 States, and replaces it only with express warranty. The only place that a claimant can now sue under this bill if it becomes law is if the manufacturer expressly warrants, this product would be able to elevate that load 95 pounds and it will not break and injure you. Only then, which is never done in the law of sales, only then will the claimant be able to recover, and against the seller the claimant will only be able to recover if the seller makes an additional warranty beyond the warranty made by the manufacturer.

As a consequence, this essentially abrogates the law of warranty which was developed to meet the inadequacies of the law of warranty as it used to exist. This revived the law of warranty as it existed in the late 1800's except for one requirement of privity.

Thank you very much.

Senator KASTEN. Senator Gorton.

Senator GORTON. Thank you, Mr. Chairman.

I appreciate your setting up this hearing as we meet to participate in it.

Mr. O'Reilly, I would like to ask you a few questions on the first round, and then perhaps go on to someone else in the next round.

Leaving aside the question of this bill and the general concept of this bill for a moment, do you think the tort systems of the several States have been fair and efficient in response to asbestos victims?

Mr. O'REILLY. Well, sir, I do, and I believe that the tort system is the only effective means to accomplish compensation for the vic-

tims and to prevent that kind of tragedy from occurring again. For example, Senator, if the products liability law such as *Greenman* v. *Yuba,* which was announced by the California Supreme Court in 1963 for the first time in California and essentially in the country except for the carpet case in New Jersey. The first time the product liability law was announced was in 1963 and as a consequence of that law, and the fact that claimants could sue under that law for their damages, the asbestos industry by their own admission, their corporate documents in the late sixties and early seventies, designed substitutes for asbestos and removed asbestos from the work place which would spare thousands, perhaps hundreds of thousands of people in the future from the ravages of this dreaded—what Dr. Merriweather called in 1950 the scourge of mankind, asbestos.

Now, *Greenman* v. *Yuba,* had existed and been announced in 1933, then the disease that we see in the sixties, seventies, and eighties never would have occurred, because the industry would have had the financial incentive to do what it never did, test for injuries to the users, do work on substitute products. And in the early 1940's we would have had—all of these asbestos-containing products would not have contained asbestos. They would have contained other things like rock mineral, mineral wool, glass fibers, et cetera.

Science has demonstrated that the substitutes were all available for use and in existence at that time and could easily have been used and accomplished the same thing as asbestos. However, because of traditional negligence at that time industry, understandably enough, did not have financial incentive to determine the dangers to users and to develop substitute products because then they would be held accountable for any dangers that were disclosed.

So, if Greenman versus Yuba had been in 1933, what we have now would have been avoided, and all the disease it has caused would have been avoided, which I think is the best part of it.

Senator GORTON. In what share of asbestos cases which have gone to the jury has the jury found the manufacturer not to have been negligent, but that the product was nevertheless unreasonably dangerous?

Mr. O'REILLY. There are a number of cases that have gone to the jury in which the jury found the manufacturer liabile under a strict liability theory without the issue of negligence going to the jury because for one reason or another the claimant waived negligence because it was simpler and less expensive to try a strict liability case on a strict liability doctrine. There have been cases in which the jury has returned a verdict of no negligence but defect under the strict liability theory because of the fact that strict liability only requires that the product be unreasonably dangerous, that the risks do not outweigh the benefits at a given point in time, at which point in time——

Senator GORTON. Do you have any estimate of how often that happens, what percentage of cases that kind of verdict occurs in?

Mr. O'REILLY. I cannot give you an estimate as to how many cases in the country the jury would come back with negligence and no defect, but I would think it would be a not surprisingly small amount. As to the number that the jury comes back on strict liabil-

ity and not on negligence that would, I think, be a rather high amount. That would be the majority. But in some cases it is because the claimant only went to the jury on strict liability and waived the negligence theory.

There have been a few in California where it went to the jury on both. The jury came back on defect because it said that there was no evidence showing that the industry knew of tests showing the risk of injury to the user. Therefore they did not think industry was negligent, but because strict liability required only that the dangers exist and be discoverable, they did find that the product was defective because it did present those risks and dangers that could have been removed at the time of manufacture.

Senator GORTON. Are the various workers' compensation systems adequate to handle to the extent that they were designed to do so, the claims of asbestos victims?

Mr. O'REILLY. Well, the problem we have, sir, is that, for example, we represent approximately 800 or 900 present victims of asbestos exposure. We have represented them for over 5 years. Since the beginning of 1978, only one has received any money under the Federal Employers Compensation Act to date. The rest, the claims are still in process. They received a response that says how much of this was due to asbestos and how much due to fumes that you inhaled in the environment, and so forth.

Senator GORTON. So the system is not adequate?

Mr. O'REILLY. The workers' compensation system is woefully inadequate to meet the claimant's needs for immediate redress, especially those that have been disabled to the point they cannot work any longer and have no other means of making a living.

Senator GORTON. Thank you, sir.

Senator KASTEN. Mr. Schwartz, I would like for you to just comment briefly, and Mr. Powers keeps jumping in, and maybe you would like to comment also on the implied warranty question as it relates to product liability tort law the question that Mr. O'Reilly was addressing back to Senator Heflin.

Mr. SCHWARTZ. Implied warranty was a middle step between negligence and modern tort law. The Supreme Court of California in the *Greenman* case that was referred to before called implied warranty a trap for the unwary. In that case, the plaintiff failed to give notice of claim to the manufacturer, and Justice Traynor, who was an architect of product liability law, said implied warranty had no place in tort law. John Wade, who is the author of the restatement of torts and probably the most renowned expert in this field in the United States today has said that one of the advances of S. 44, a major advance of S. 44 is that it places tort law on a tort law base and does not inject commercial law concepts such as implied warranty.

S. 44 does leave commercial law where it always has been deemed appropriate; that is, with respect to commercial losses. It specifically leaves commercial losses direct and consequential to the UCC. To show you how something like this can be a trap for the unwary, in a recent case in the eleventh circuit, which was applying Alabama law, decided September 30, 1983, *Sellers* v. *Robins,* a woman who suffered a serious injury brought her case under implied warranty instead of tort law. The statute of limitations had

run because it was 4 years after she had purchased the product. She lost her claim, could not file a new tort claim because by the time the case was over the statute of limitations on tort law had run.

This is one reason why many professors feel that a sound uniform product liability law in the United States would not confuse the doctrine or middle step ground which was implied warranty.

I would like to also speak to requestion of how the UCC was developed. The UCC was never developed by the Congress of the United States or recommended by the Congress of the United States to the States. It was developed by the commissioners on the uniform State laws. When I was chairman of the Interagency Task Force on Product Liability, we went to the staff of the commissioners and asked them whether they would develop a model law on product liability for use by the States. The staff declined on behalf of the commissioners. They said it would be impossible to have the States be persuaded to adopt uniform rules in this area. It was absolutely impossible to do so, and they rejected it.

Senator KASTEN. Professor Powers, I would like you to respond further to the question that Mr. Schwartz just replied to having to do with implied warranties, but I know that one of your areas of expertise is the whole question of negligence and strict liability, and I would like to give you an opportunity to agree or disagree with Mr. O'Reilly's comments of the case law as it relates to the law of negligence and strict liability in the United States.

Mr. POWERS. First, there is a great misperception here that the adoption of strict product liability in cases like *Greenman* was necessary as an engine for safety. Let me first make a comment about *Greenman.* Justice Traynor specifically stated in *Greenman* that there was evidence upon which a negligence verdict would be upheld. The problem in the thirties and forties when product safety was more of a problem, was that there were doctrines that kept plaintiffs from recovering either under a warranty theory or a negligence theory, doctrines like requiring to give notice to the manufacturer within a particular period of time. Indeed, in *Greenman,* the court specifically ignored one of those requirements in the UCC itself in order to permit the plaintiff to recover.

I think that was a great advance. There should not be artificial barriers to plaintiffs recovering when, in fact, the manufacturer has been negligent. But that was the situation which was alleviated originally in the cases that developed strict liability. In the overwhelming majority of them, negligence could be proved.

There is a misperception here that negligence does not give an incentive on manufacturers to go out and test their products and develop new ways of making products. That is simply not the case. If a manufacturer simply sits back and does not look for new ways to make products, does not engage in research and development, does not go out and look for risks that his products have, that is the very conduct that would be negligent. In most of the cases, indeed, the asbestos cases, where product liability is seen as a necessary device to have compensation, there is evidence that the manufacturer should have known about these risks and was therefore negligent.

the magnitude of the dangers which are a matter of common knowledge to persons in the same or similar position, and unreasonable danger also means the consequences of product misuse where the misuse does not constitute reasonably anticipated conduct.

And, gentlemen of the jury, unreasonable danger also means the consequences of product alterations or modifications where the alteration or modification does not constitute reasonably anticipated conduct.

Answer "yes" or "no."

To which the jury will answer," "huh?" What I am saying is that this cannot be handled by jurors. What we have done in this bill is to put the usual burdens upon the plaintiff and then we impose upon the plaintiff the extra burden to negate what we call in law inferential rebuttal issues. What that means is, the plaintiff must negate no duty. This is all very clear, I am sure; but this is what we have to ask the jurors to do. The jurors cannot handle it.

And, Senator, would you permit me to use the rest of your time?

Senator KASTEN. Judge Pope, why do you not in about 30 seconds complete your statement?

Judge POPE. Well, it relates to another thing, but I just wanted to give another example. If we cannot agree on implied warranties, 50 States cannot agree upon them, but look at section 2(7) that defines "manufacturer." I think this has escaped everyone. A "manufacturer" is one who is engaged in business "to design or formulate and to produce, create, and make.

Now, what this means is that A can design a chain saw, A can design it, and then B can construct it, and neither one of them is a "manufacturer." They both wholly escape. I do not think that this is what the committee intended, but under this kind of a statute, the manufacturer—there may be no manufacturer. One designs it, and he does not make it. To me that is an unfair provision, and I do not know what the ruling will be. If there is no manufacturer under this act, then do we fall back upon the State law? Twenty years from now the U. S. Supreme Court will probably answer that question for us.

Senator KASTEN. Senator Gorton.

Senator GORTON. Professor Powers, a number of my colleagues have expressed concern for victims who are entitled to recover under their current State laws because of the relevancy of manufacturers' conduct but could not recover if this bill would become law. You questioned that assumption, or perhaps it is fair to say you questioned the fairness of that, of some of those distinctions, but can you estimate what the size of that class would be, whether or not it would matter under most circumstances in cases of difficult proof, and perhaps comment on whether or not a plaintiff could pursuant to this bill, invoke the doctrine of res ipsa loquitur.

Mr. POWERS. Let me answer the second question first. I do not think there is anything in this bill that would preclude the use of res ipsa loquitur or any presumptions or evidentiary conclusions that State courts currently use in negligence cases. Let me give same examples. Res ipsa loquitur is one of them. Violation of safety legislation is another one. Most States say violation of safety legislation is per se unreasonable conduct. I do not see anything in the bill that would prevent plaintiffs from using the same sorts of evidentiary presumptions that are currently used.

Senator HEFLIN. Might I interrupt to ask if you think that the preemption language is as broad as it might be interpreted?

Mr. POWERS. I believe it refers to the standard of the reasonably prudent person, and there is no reason why that ought not be defined the way that term has been defined for a century. There are lots of details in defining the term "reasonable care". I see nothing in the bill to prevent those from being used.

Let me give one other example. A manufacturer in a negligence case is held to a standard of a reasonably prudent person under the circumstances, one of which is that the manufacturer is an expert in the field. We hold doctors to the care of reasonable doctors, not of reasonable ordinary citizens. There is nothing in the bill that would prevent these circumstances from being taken into account to determine what a reasonably prudent manufacturer would do.

So, in that sense, the res ipsa loquitur issue is not a problem. Nor would there be problem these other evidentiary and presumptive devices used in negligence cases.

Now, let me turn to your first question. Let me start by saying I think the number of cases in which the manufacturer has not been negligent and the plaintiff ought to recover are very small, unless we adopt a tax base compensation scheme—which I think would be a fair system for victims of asbestos and other injuries.

I also believe that the number of cases in which the difference between negligence and defectiveness really makes a difference—other than confusing the issues—is very small. It is true that very few cases are submitted on a negligence theory, but that is because there is no sense in submitting it on a negligence theory if in fact you can submit it on a strict liability theory. Trial lawyers, I believe, will tell you that strict liability cases get tried nearly identically to negligence cases.

The problem with trying to draw this distinction between negligence and strict liability, differences like the one I mentioned earlier between the state of the art defense, which is a defense under strict liability, and the inability to discover risks, which is not a defense under strict liability, is that in both cases the manufacturer could not have done anything about the product. In neither case is the plaintiff more deserving of compensation than in the other. In one sense they are both deserving of compensation. They have been injured. But one of them gets to recover and the other does not.

All consumers are paying into this fund through higher prices, and I would question the ability to look those two people in the face and say one of you gets to recover, the other does not, because of some arbitrary distinction the courts have tried to work out in distinguishing between defectiveness and negligence. Those same people, if you told them one got to recover and the other did not, because the manufacturer behaved improperly in the first case but not in the other, that is something I think the public can understand.

Senator KASTEN. Gentlemen, I would like to thank you for your participation this morning. There may be—in fact I should say there will be other questions submitted to a number of you by members of the committee who were unable to be at the hearing this morning or by members who were here but were unable because of time constraints to submit their questions.

We thank you for your testimony.

The next panel includes Mr. Jeffrey Teitz, Ms. Elizabeth Langer, Ms. Connelly, and Mr. Eppel, and I am going to ask Gerald Bepko, the dean of the Indiana University School of Law, to join the second panel if you could, Dean Bepko. We will continue to operate within the 5-minute rule for both the panel members and the committee, but I want to just make an exception. Dean Bepko was to have been part of the previous panel and was going to be accompanying the Honorable Jack Pope. Because of time problems I understand you were not able to be here, so what I would like to do is to ask you to proceed now with whatever you were going to say, and I would ask you to try to summarize your remarks in a couple of minutes, and then we will go to the rest of the panel on a regular 5-minute basis.

STATEMENTS OF GERALD L. BEPKO, DEAN, INDIANA UNIVERSITY SCHOOL OF LAW; JEFFREY TEITZ, RHODE ISLAND HOUSE OF REPRESENTATIVES, ON BEHALF OF NATIONAL CONFERENCE OF STATE LEGISLATURES; ELIZABETH LANGER, NATIONAL WOMEN'S HEALTH NETWORK; JEANNE CONNELLY, COUNSEL COALITION FOR UNIFORM PRODUCT LIABILITY LAW; ROBERT D. ROGERS, LUBBOCK MANUFACTURING CO.; AND JOHN EPPEL, LAWYERS ADVISORY COMMITTEE TO THE BUSINESS ROUNDTABLE

Mr. BEPKO. I did not know I was going to be coming here until late last week, and did not have a chance to prepare a statement. I was asked to respond concerning the impact of this proposed legislation on the Uniform Commercial Code, which is my field. I have two preliminary thoughts, and then I will be happy to answer questions, as I was told that that would be my principal role.

My first comment is a preliminary comment, and it has to do with the preemption language which it seems to me is the critical language in terms of the effect of this proposed legislation on the Uniform Commercial Code. In section 3(a) of the proposed statute there is broad language of coverage saying the proposed law would cover all civil actions brought for any type of loss or damage caused by a product.

In section 3(b), in the first sentence, there is a broad limitation of the type of recovery that can be obtained in any case. It says no person may recover for any loss or damage caused by a product except to the extent that the loss or damage constitutes harm.

Harm, of course, is defined in terms of personal injury or property damage. The literal meaning of this language is that if enacted, Dow Chemical would not be able to sue Union Carbide if they purchased chemicals from Union Carbide which were in breach of the warranty of merchantability. This provision seems to eliminate all liability except for loss or damage which constitutes harm, and I think that result would be a shocking intrusion and change in the commercial law.

I do not think, however, that is what is intended in the proposed statute. It seems to me that other language in the proposed law makes it clear that this may just be an unfortunately worded sentence, and all that is intended is to take into this statute those

cases which involve personal injury or property damage and to leave all of the commercial losses to other law, not to preclude anyone from suing for commercial loss, but to leave that to other law.

The other brief comment that I have has to do with the general impact of this proposed statute on the Uniform Commercial Code. Of course, the Uniform Commercial Code and its warranty provisions have been available for persons who were injured or suffered property damage in the past. VCC warranties served as kind of an alternative to the tort system, which is the principal subject of focus of this proposed law.

As an alternative, some of these warranty provisions did provide some more opportunities for plaintiffs who otherwise might not have been able to sue, but basically the Uniform Commercial Code was drafted at a time when the jurisprudence in product liability was in its very early stages, and for that reason did not address many of the problems which have come into the courts since that time, and it really is not a very contemporary statement of policy on the subject of product liability.

Also, it covers so many other different types of transactions, other than personal injury or property damage that there are some obstacles for plaintiff resulting from this broad coverage, things like the notice requirement, that plaintiffs must provide notice before they are entitled to bring a suit. That sort of thing stems from the commercial side of the Uniform Commercial Code and, I think, creates some obstacles to use of the UCC by injured consumers.

Senator KASTEN. Professor, I am going to have to ask you to summarize. I was told you were going to speak for approximately 1 minute, so if you could summarize.

Mr. BEPKO. You know that law teachers cannot control themselves when speaking. They speak either for 50 minutes or until a bell rings. Let me just quickly say that the impact on the Uniform Commercial Code is not as important as the fact that warranty has been the subject of State law in the past. There is a process involving the National Conference of Commissioners on Uniform State Laws and the American Law Institute, which has been very successful in producing legislation to be adopted by the States which can be adapted to the States, and I believe that that process is one that should be considered in the evolution of products liability.

Senator KASTEN. Thank you, Professor Bepko.

The first witness on this panel is the Honorable Jeffrey Teitz from Newport, R.I.

Mr. TEITZ. Thank you, Mr. Chairman.

I appreciate the opportunity to appear here today and address the products liability issue. Before I begin, I would like to clarify your record. The witness list indicates that I am testifying as a private attorney. That is not the case. I am testifying in my capacity as a State legislator. I have been a member of the Rhode Island House of Representatives for 12 years and the chairman of our Judiciary Committee for the past 6.

I am also serving as vice chairman of the Law and Justice Committee of the National Conference of State Legislatures, and I am appearing here today on behalf of the National Conference of State

Legislatures to express that organization's views on the legislation. CSL is the official representative of the Nation's 7,000 State legislators, and I speak today in opposition to both the original version of S. 44 and the October staff draft on their behalf.

We oppose the bill because it constitutes an unwarranted preemption of State law. The October draft makes only minor changes in the bill, and we find that the new language for the most part raises the same objections as the old. The State Federal Assembly of the National Conference of State Legislatures, acting in December of 1983, unanimously adopted a resolution strongly opposing all legislation pending before Congress which would preempt State laws regulating recovery for injuries caused by defective products.

This policy resolution opposing Federal product liability legislation reflects not only our general policy opposing the unjustified Federal preemption of State law but our strong conviction that it is particularly improper for the Federal Government to restrict and to structure citizen access to State courts as this proposal would do.

We are joined by the National Governors Association and by the National Association of Chief Justices of State Supreme Courts in our opposition to this legislation.

While the stated goal of S. 44 is a uniform set of rules governing the liability of manufacturers and sellers for defective products, the drafters have by and large ignored the very rules which are presently in force in a large majority of the States. In almost every instance, the bill would overturn the common law consensus which has been reached in the States and would substitute one less favorable to the victim of the defective product.

During the last two decades, the overwhelming majority of the States have adopted a strict liability standard in product liability cases. Courts and legislatures throughout the country have recognized that such a rule serves both to encourage manufacturers to produce safer products and to provide compensation for persons who through no fault of their own are injured by unreasonably dangerous products.

S. 44 would require the States to impose a more lenient standard on the manufacturer in design defect cases which are really the most serious product liability cases. The present standard of strict liability being applied by most States has served the public interest well. It has led to the exposure of unreasonably dangerous products, and it has forced their removal from the marketplace.

The proposed legislation also tampers with the doctrine of joint and severable liability which is nearly universally applied by the States in tort cases. Changing the rule for product liability cases will create endless confusion and multiparty litigation involving both defective products counts and unrelated claims, for example, a case against both the driver of an automobile for negligence and the manufacturer alleging the vehicle defect, or a case against both the doctor for medical malpractice and a drug company for marketing an unsafe drug.

This bill will make it virtually impossible to resolve such cases in a single proceeding. In most jurisdictions, manufacturers responsible for the dangers associated with all foreseeable uses of his product, this standard would also be watered down by S. 44. Over 40 States allow the court to impose punitive damages when the

proven conduct of the manufacturer evidences a blatant disregard for the consuming public. S. 44 would virtually eliminate this effective deterrent to corporate misconduct.

Under the staff draft, only the first victim to file suit could collect punitive damage, and the size of his recovery would be drastically limited. All subsequent victims would be denied the right to seek punitive damages even though their injuries were severe and the manufacturer's conduct was totally irresponsible.

If the real purpose is to codify the existing products liability law, this bill simply does not address the issue. It overturns the common law consensus on these and other very important issues that have been reached in the States after years of examination of these complex issues. For that reason, the National Conference of State Legislatures urges you not to exercise your power of preemption in this subject area.

[The statement follows:]

STATEMENT OF JEFFREY J. TEITZ, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. Chairman, thank you for this opportunity to speak on S. 44 and the products liability issue.

My name is Jeffrey Teitz. I have for twelve years been a state representative from Newport, Rhode Island. I have for six years been chairman of the Judiciary committee of the Rhode Island House of Representatives. I also serve as Vice-Chairman of the Law and Justice Committee of the National Conference of State Legislatures. I am a graduate of the Harvard Law School and a practicing attorney in Rhode Island.

I speak today as a representative of the National Conference of State Legislatures. NCSL is the official representative of the country's 7,438 state lawmakers in the 50 states and in the American territories and commonwealths.

I speak today in opposition to both the original version and the October staff draft of S. 44. We oppose the bill because it constitutes an unwarrented preemption of state law. The October draft makes only minor changes in the bill and we find the new language for the most part as objectionable as the old language.

The State-Federal Assembly of the National Conference of State Legislatures in December of 1983 unanimously adopted a resolution strongly opposing all legislation pending before Congress which would preempt state laws regulating recovery for injuries caused by defective products. This policy resolution opposing federal products liability legislation was adopted in conformance with NCSL's general policy opposing the unjustified federal preemption of state law and in the conviction that it is particularly improper for the federal government to restrict citizen access to state courts.

NCSL believes that preemptive federal legislation can be justified only if three tests are met.

The first NCSL test for federal preemptive legislation is that preemption must be shown to be the only feasible means of dealing with the problem. The alleged insurance cost problem should be addressed by insurance legislation. The Risk Retention Act of 1981 should be given a chance to work and additional insurance-related solutions such as elimination of subjective rate-making practices should be considered. The insurance law approach is also to be preferred because substantive tort law should be designed to be fair to the parties, not to affect insurance rates.

In fact, S. 44 is not a feasible means of dealing with the problem of products liability costs and subsequent insurance costs. The bill merely shifts the costs from manufacturers and sellers of defective products to individuals and the public welfare system. The problem of injuries caused by defective products is not solved by ignoring it.

The second NCSL test requires a showing that federal preemption is necessary to achieve a truly compelling national objective. Uniformity for its own sake is not a compelling objective: nor is the convenience of a uniform standard a compelling objective.

Every legal issue under state jurisdiction has up to 50 standards of compliance. Some inconvenience and cost in adjusting to interstate variation in legal standards

is the acceptable price we pay for the benefits of a federal system. The law in each state reflects the unique values of that community and is adapted to the unique social and economic conditions of that community. The citizens of the one state may prefer more consumer protection and may be willing to place burdens on business activity to achieve it. The citizens of another state may prefer to absorb the social and economic cost of product-related injuries through its health and welfare programs in order to encourage or even subsidize business activity. The legal diversity produced by our federal system is also valuable because it allows the states to act as laboratories, testing the social and economic effects of different products liability standards.

The healthy diversity of state products liability law would be eliminated by S. 44. The capacity for common law growth necessary to adapt to changing local conditions would be cut off. State legislative experimentation would be precluded. No truly compelling national objective would be achieved.

Under its third test, NCSL believes a showing must be made that state action has resulted in serious conflicts burdening interstate economic activity and interfering with similar national goals. No such showing has been made in the case of state product liability law.

The proponents of S. 44 have produced no significant statistical evidence showing that the alleged lack of uniformity in products liability law has increased the cost of products for consumers, substantially diminished the development of new products, or forced companies out of business.

Even assuming for the sake of argument that significant costs are associated with the lack of uniformity in products liability Law, S. 44 would not reduce such costs because it would not produce a uniform standard. Neither version of S. 44 makes provision for federal question jurisdiction or for a federal administrative mechanism. Fifty state court systems if required to interpret the unfamiliar standards in S. 44 could not be expected to arrive independently at uniform interpretations. Nor could the U.S. Supreme Court be expected to intervene with enough frequency to resolve conflicts crated by S. 44.

The uniformity argument for S. 44 fails on close inspection. Both the original version and the October staff draft version of the bill are addressed to two issues on which there is little interstate variation. All but a handful of states have adopted a strict liability standard. Less than half of the states have adopted a statute of repose, and an increasing number of state statutes of repose have been declared unconstitutional, violating the fourteenth amendment or state constitutional guarantees of access to courts. Thus, S. 44 would produce upheaval not uniformity.

Of course, it may be that some proponents of S. 44 are less concerned about the lack of uniformity in state law than what may be perceived as an excessive proconsumer tilt in the products liability law of most states. If the primary purpose of the bill were to promote uniformity, a codification of the majority rule might be expected. But S. 44 radically changes the majority rule to favor defendants.

The October staff draft makes sweeping changes in current law and is just as objectionable as the original bill. The staff draft:

Eliminates strict liability for design defects and failure to warn;

Undercuts joint and several liability;

Reduces recovery in third-part suits by injured workers;

Imposes a statute of repose;

Severely restricts punitive damages; and

Radically expands affirmative defenses including misuse, alteration, contributary negligence, assumption of risk, and superseding cause.

The statute of repose in S. 44 would have the incredible effect of denying citizen access to state courts, thereby preempting provisions in some state constitutions guaranteeing access to the courts to pursue wrongs and possibly violation fourteenth amendment guarantees.

S. 44 is unjustified if its primary purpose is to force a prodefendant standard on states that do not want it. The proper forums for the argument that the majority rule unjustifiably favors plaintiffs are in state courts and state legislatures where such arguments can be evaluated in light of local conditions and community values.

S. 44 therefore fails the three NCSL preemption tests in every respect. It is not surprising that state legislators from both political parties and from all regions of the country oppose the bill. State governors and state judges also oppose the bill. The National govenors Association, for example, recently adopted a resolution opposing S. 44 as an unwarranted preemption of state law.

NCSL takes a balanced and moderate approach to preemption issues. We approach preemption issues on a case-by-case basis in recognition that in some instances the federal interest may outweight the state interest in jurisdiction. We

simply ask for the same consideration from the federal government; we ask that the federal government recognize instances when the state interest in jurisdiction outweights the federal interest. Products liability is one such instance. Tort law is as traditional and as important a state responsibility as public education or public safety. To federalize, as S. 44 proposes, the liability standards for injuries caused by defective products would be unprecedented. The sweeping preemption of state tort law in both versions of S. 44 can only be characterized as radical and unjustified.

Senator KASTEN. The next witness is Elizabeth Langer of the National Women's Health Network. Ms. Langer.

Ms. LANGER. Good morning, Mr. Chairman.

I am here this morning representing the views of the National Women's Health Network, a nonprofit organization which has over half a million members across the United States.

Because women bear the burdens of pregnancy, childbirth, and contraception, women have an especially vital and compelling interest in the safety and efficacy of drugs, medical devices, and other products targeted to the reproductive cycle. We believe that the right to judicial redress for injuries received as a result of defective drugs and devices is of fundamental import in insuring the safety of these products.

We oppose S. 44 in the strongest possible terms because its provisions are designed to insulate manufacturers and sellers of defective and dangerous products from liability at the expense of injured consumers. By virtually eliminating punitive damages and strict liability, and by expanding manufacturers' defenses, the legislation severely undercuts the primary incentive manufacturers now have to guard against defective and unsafe products, and that is meaningful damage awards.

The bill's assault on punitive damages is perhaps its most unconscionable provision. S. 44 allows punitive damages only for the first party injured by a particular product. After that first award, no other person, regardless of the severity of injury or other circumstances, may obtain punitive damages under this legislation.

The societal purposes served by punitive damages are threefold: Punishment, deterrence, and compensation to victims for otherwise uncompensable losses. Punitive damages provide a system of private law enforcement by striking corporate defendants in their most vulnerable spot, the balance sheet. Elimination of punitive damages vastly increases the corporate motivation to overlook safety in favor of profits, as profits can easily absorb compensatory damage awards in most cases.

In short, reducing the threat of punitive damage awards substantially increases incentives to intentionally manufacture unsafe or defective products. Moreover, although punitive damages are frequently requested in product liability actions, they are awarded only in cases of the most egregious and reckless conduct. One such situation which particularly concerns the National Women's Health Network is the Dalkon Shield intrauterine device manufactured by A. H. Robins Co.

The company put the Dalkon Shield on the market without subjecting the tail string to simple testing. After thousands of women complained of severe pelvic infections which often necessitated the removal of all or part of their reproductive systems, it became clear that the shield's tail string acted as a ladder providing an easy conduit for bacteria to enter the uterus.

The company refused to halt domestic sales until 1974, after 2.8 million Dalkon Shields had been sold, yet hundreds of thousands of shields remained lodged in unsuspecting women, and to this date Robins has refused to issue notices and warnings to these potential victims. Robins' course of action has led to punitive damage awards, and the threat of further awards has encouraged the company to offer meaningful settlements in numerous cases.

Just this past Wednesday, Chief U.S. Judge Miles Lord accused three top officers of Robins of "corporate irresponsibility at its meanest." I have obtained a transcript of Judge Lord's remarks to A. H. Robins officials, and would like to read several relevant excerpts.

The judge said:

> None of you has faced up to the fact that more than 9,000 women have made claims that they gave up part of their womanhood so that your company might prosper, and there stand behind them legions more who have been injured but who have not sought relief in the courts of the land. Gentlemen, you state that your company has suffered enough, that the infliction of further punishment in the form of punitive damages will cause harm to your ongoing business, will punish innocent shareholders, and could conceivably depress your profits to the point where you could not survive as a competitor in this industry, but no court would hear this plea when your company in the face of overwhelming evidence denies its guilt and continues its monstrous mischief.

Judge Lord continued:

> Mr. Forrest, you have told me that you are working with Members of Congress of the United States to ask them to find a way of forgiving you from punitive damages which might otherwise be imposed, yet the profits of your company continue to mount all the while. Insofar as this court is able to determine, you three men and your company still engage in the self-same course of wrongdoing in which you originally commenced. Until such time as your company indicates that it is willing to cease and desist this deception and to seek out and advise victims, your remonstrances to Congress and to the courts of this country are indeed hollow and cynical.

As the judge recognized, the threat of punitive damages is the only aspect of the Dalkon Shield litigation that causes A. H. Robins any discomfort. We strongly urge that this committee abandon its plan to eliminate punitive damages.

There are several other provisions of the bill that would have a devastating effect on an injured party's ability to recover damages. Most notable is section 5(b), the elimination of strict liability for defects and design or formulation.

Senator KASTEN. If I could ask you to summarize your comments, please.

Ms. LANGER. Another provision which we are terribly concerned about is the one that Mr. Goodman testified to earlier, and that is the possible preemption of the market share liability theory in *Sindell* v. *Abbott Laboratories.* Sections 3 and 9 in the October draft appear to overrule *Sindell,* and if that was not your intent, we would appreciate some specific changes in those sections. We are also opposed to expanding the affirmative defenses in sections 9 (c), (d), and (e).

As the foregoing discussion indicates, S. 44 would make recovery for serious injuries far more difficult and expensive than it is under existing tort law. More importantly, it would severely reduce incentives for manufacturers of drugs and devices to ensure the safety of their products.

Senator KASTEN. Could I ask you to summarize your comments, please? Your time has expired.

Ms. LANGER. Yes. The National Women's Health Network urges this Committee not to report out S. 44.

Thank you.

Senator KASTEN. The next witness is Jeanne Connelly of Washington, D.C.

Ms. CONNELLY. I am testifying today on behalf of the Coalition for Uniform Product Liability Law. The coalition is composed of approximately 300 businesses and trade and professional associations, all of whom are interested in a uniform product liability law.

As I sat here today, I had the feeling that possibly the opponents of this legislation and I were reading two different bills. As I listened to the complaints made about S. 44, I really could not understand them. I do not know how it could be said more clearly in the bill that State law on joint and several liability will be applied. S. 44 spells that out in several places. Also, despite the fact that the bill adopts a very traditional fault standard, as espoused in the restatement, people continue to say that it is going to apply a gross negligence standard. There is no evidence of that whatsoever in the legislation.

One witness on an earlier panel said that thousands of causes of actions of claimants would be destroyed in Michigan because the bill reverses the *Sindell* decision, and that was mentioned again by a witness on this panel. Well, the bill at one time did intend to address the *Sindell* decision, but as Senator Kasten pointed out, that provision was later removed from the bill. It no longer does that. How much clearer can that be made? And if there are ways that it can be made clearer, I think that everyone would like to hear those suggestions, because it was not the intent of the bill's authors to address *Sindell*.

The representative for the asbestos victims said that asbestos would not be considered defective under the bill. Well, in every asbestos case of which I am aware, the claim is made that the manufacturer of asbestos knew or should have known, based upon available studies, of the danger of asbestos. The bill says that if the manufacturer knew or should have known of the danger, they will be held liable. You cannot have it both ways. If they knew of the danger, as is claimed, they will be liable under this bill.

Mr. Teitz sitting next to me says there will be incredible difficulties in apportioning damages when you have both a manufacturer of a product and another party, such as a driver of a car or a physician, as defendants in the same lawsuit. Right now you have incredible confusion because the very standards of liability can differ if you have a doctor and the manufacturer of the product in the same suit. This is because most people in our society are held to a standard of reasonable care—doctors, lawyers, engineers, the driver of the car—and yet when you turn to the manufacturer of the product you suddenly get into a very confusing morass in which the standard is articulated as strict liability but the court really means something else.

The proponents of S. 44 are saying, clear up all this confusion. Judge everybody by the same standards. The people I represent are not asking for a shield from liability. They are not asking to be in-

sulated from liability. They are saying, judge me by my conduct. Judge me by what I do. Judge me like you judge everybody else in our society.

I have with me today Mr. Bob Rogers, who is with the Lubbock Manufacturing Co. in Lubbock, Tex., and I would like to turn the rest of the time over to him so that he can tell how the vagaries of State law affected his company.

[The statement follows:]

STATEMENT OF JEANNE K. CONNELLY, ON BEHALF OF COALITION FOR UNIFORM PRODUCT LIABILITY LAW

Good morning Mr. Chairman and Members of the Subcommittee. My name is Jeanne Connelly and I am testifying today on behalf of the Coalition for Uniform Product Liability Law. The Coalition is a group of approximately 150 businesses both large and small, from around the country, as well as over 100 trade and professional associations, all of whom have joined together to seek the enactment of a fair and uniform product liability law.[1]

I would like to thank the Members of the Senate Commerce Subcommittee for the opportunity to appear before you today to discuss S. 44, the product liability bill currently pending the Committee. While there have already been numerous days of hearings and voluminous testimony concerning this legislation, the thrust of today's hearing, as I understand it, is to focus on the most recent changes made to the bill, as incorporated in the staff working draft dated October 19, 1983.

A comparison of S. 44, as originally introduced, with the August, September and, finally, the October drafts of the bill reveals that approximately 35 major or nontechnical changes have been made. These changes are fully described in Appendix B. Virtually every one of these changes has been made in response to concerns articulated by some consumer groups who believed them necessary to properly balance the interests of product sellers and consumers.

We are not here today to reargue the merits of the changes made to S. 44. The Coalition for Uniform Product Liability Law continues to support the Senate's early passage of S. 44 with these changes. Let me point out, however, that by noting the arguments made by the proponents of the changes, we are not necessarily expressing agreement with these arguments, but merely bringing them to your attention. Let me mention some of the most important changes and describe how they will affect claimants:

Existence of alternative design.—In a design defect case, S. 44 originally required the claimant to prove not only that the manufacturer knew or should have known about the existence of an alternative design, but that such alternative design met a series of very specific requirements regarding feasibility, safety, desirability, etc. This provision, which was criticized as being unfairly burdensome to the claimant, has been eliminated entirely from the bill as revised. The plaintiff's burden in design defect cases is now simpler—it must be shown that the manufacturer knew or should have known of the danger and that a reasonably prudent person would not have used such a design. Once this showing is made, the burden would now clearly be on the defendant to prove any defense, such as that the product was unavoidably dangerous.

Reasonably prudent test.—Some critics argued that conditional liability on whether a reasonably prudent manufacturer would have used a particular design or provided a specific warning permitted the industry involved to set the standard by which its conduct would be judged, even if that conduct was dangerous or unreasonable. In response to their suggestion, the manufacturer's conduct is now tested against that of a "reasonably prudent person" rather than a "reasonably prudent manufacturer."

Unreasonably dangerous design test.—S. 44 originally stated that a product is not unreasonably dangerous in design unless a means to eliminate the harm is within practical technological feasibility. The October draft adds to this an additional requirement that the benefits and usefulness of the product to the public must outweigh the likelihood and seriousness of the harm. This means that a manufacturer of a frivolous or socially useless product that is defective will not escape liability simply because there was no practical means to eliminate the danger.

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[1] The attachments are in the Committee files.

Failure to warn standard.—The test for determining whether the lack of a warning renders a product unreasonably dangerous originally focused on whether a warning would have led a reasonably prudent user to decline to use the product or to use it differently. This was strongly criticized because it looked to whether the conduct of the product user was reasonable rather than to whether such conduct, reasonable or not, could have been anticipated by the manufacturer. In response to such comments, a foreseeability standard is now contained in S. 44's requirement that a manufacturer provide a warning if it would have led a product user, in the course of reasonably anticipated conduct, to decline to use the product or to use it so as to avoid danger.

Workers' compensation.—S. 44 originally required that injured persons must exhaust their remedies under applicable workers' compensation laws before proceeding with product liability actions under the Act. This provision has been deleted and plaintiffs may now proceed with their product liability actions even if their workers' compensation claims have not been finally resolved.

Definitions.—The definition of "express warranty" has been clarified to indicate that it is not necessary for a manufacturer to use the terms "warranty" or "guarantee" or to intend to made an express warranty. Since the bill provides for strict liability in the case of a breach of an express warranty, the change should ease the claimant's burden in proving a product defective because of a misrepresentation. The definition of "manufacturer" has been broadened to be more inclusive, further assuring an injured person that the responsible party will be subject to the Act. The definition of "reasonably anticipated conduct" has been changed to make clear that the activities of specialized groups of consumers (e.g., handicapped or non-English speaking persons) may fall within its scope.

Collateral estoppel.—In response to objections that the collateral estoppel provisions of the bill unfairly required the same issue to be repeatedly litigated in separate lawsuits at great expense, this provision has been deleted entirely from the bill.

Knowledge test.—Critics argued that S. 44's standard for what a manufacturer should have known, i.e., only information that had been accepted in the scientific, technical or medical community, allowed a manufacturer to ignore research indicating that a product was dangerous simply because that study had not yet received widespread acceptance in the relevant community. The October draft meets this concern by imputing knowledge to the manufacturer in cases where the manufacturer should have known of the danger through the exercise of reasonable prudence.

Time period for judging manufacturer's knowledge.—Originally, the relevant time period for judging whether a manufacturer knew or should have known of a danger was at the time the product was sold; now it is the time the product left the control of the manufacturer. This is intended to encompass a situation where a manufacturer learns of a danger associated with a product after a contract of sale has been signed, but before the product has left the manufacturer's control. Again, the authors of the amendment intended to expand the liability of manufacturers.

Joint and several liability.—S. 44, as introduced, directed judgment against liable parties in proportion to their percentage of responsibility for the claimant's harm. Only after one year could uncollectable judgments be reallocated among the other liable parties. Now, where a defendant is jointly and severally liable with another person, the judgment is immediately entered against such defendant on the basis of joint and several liability in accordance with applicable State law. The court's determination of contribution among solvent joint tortfeasors will, however, be determined by the percentage of their responsibility for the claimant's harm.

Obvious dangers.—As in the failure to warn standard, the foreseeability test has now been incorporated in the definition of obvious dangers. Rather than looking to whether a reasonably prudent product user would have been aware of the danger without a warning, the test is now whether the product user, in the course of reasonably anticipated conduct, would be aware of the danger, including the magnitude of the danger. Thus, if reasonably anticipated, the dangers from misusing a product may require a warning. Also, the product user must be aware of the full magnitude of the danger for the danger to be considered obvious.

Misuse and assumption of risk.—Misuse is no longer determined by looking at what is the reasonable practice of product users, but is judged now by whether it is inconsistent with the reasonably anticipated conduct of users. Assumption of risk has been clarified to require not only that the claimant knew of the product's defective condition, but that the claimant also understood the risk and the potential severity of the harm.

Statute of limitations.—An entirely new provision has been added to the October draft of S. 44 establishing a two-year statute of limitations. This statute does not begin to run until the time that the claimant has discovered or should have discov-

ered both the harm and its cause. This discovery rule is one of the most consumer-oriented statutes of limitation to be found in any current state law and assures uniformity in the treatment of plaintiffs.

Other changes.—In addition to the changes mentioned above, the October draft of S. 44 tightens the definition of an "unavoidably dangerous" product to limit its use by manufacturers as a defense, it expands the scope of potentially required warnings, it limits the situations in which a manufacturer may provide warnings to a third party rather than to a product user, it expands the type of statements that may be considered express warranties, and it broadens the exception to the capital goods repose period for misrepresentation or fraudulent concealment.

There has also been a major change in the punitive damages provision of S. 44. Because it is unclear whether the net effect of this change is to improve or impair the provision, this matter is to be the subject of detailed consideration by a separate panel.

In summary, the authors of S. 44 have made every attempt to meet the articulated concerns of consumer groups and others that the bill would unreasonably increase the plaintiff's burden of proving a product liability action. I think that everyone would agree that virtually all of the changes in the October draft of S. 44 are intended to benefit consumers.

Some opponents of S. 44 have, however, continued to articulate one key concern which has not been taken into consideration by the October draft. This is the bill's provision that design defect and failure to warn cases will be judged on the basis of fault rather than on the basis of strict liability. The fault-based standard, which is actually applied by most states at the present time, is a central and indispensable feature of the bill.

The bill's major purpose, apart from creating uniformity, is to prevent the shift in our tort law away from personal responsibility for one's actions to a system based on strict or, in some cases, absolute liability.

For example, the New Jersey Supreme Court is clearly no longer interested in finding fault since the recent *Beshada* case holds that a manufacturer may be liable for failing to provide a warning about a danger that was scientifically unknowable at the time of manufacture. While other courts utilize a definition of strict liability that looks to the knowledge of the manufacturer and the reasonableness of his or her conduct, the question asked, in New Jersey at least, in judging the responsibility of manufacturers is not whether that manufacturer acted reasonably in trying to fashion a safe product, but simply whether that manufacturer placed a product on the market that was later found to be defective and to cause harm.

There is no doubt that the trend is to make manufacturers the insurers of the products they place into the stream of commerce. Based on their relative financial strength and ability to insure against product liability claims, the argument is that social policy dictates that the "deep-pocket" party shall pay for all product-related injuries.

But strict liability, as enforced in our present complex and confusing court system, is very expensive. It takes years to resolve a claim and it is well known that the attorneys are receiving $7 for every $6 awarded to claimants.

Strict liability is also inefficient and may actually reduce the safety of products and product users by discouraging reasonable and prudent conduct. George Priest, a Professor of Law at Yale University, has undertaken research to identify policies that will reduce the seriousness and frequency of injuries suffered by consumers. It is his conclusion that the policy adopted by the courts over the last twenty years—to expand the liability of manufacturers—is likely to have increased rather than decreased not only the rate of product defects, but the rate of consumer injuries as well.[2]

I have with me today a businessman from Texas, Mr. Robert D. Rogers of the Lubbock Manufacturing Co. Mr. Rogers was forced out of the manufacturing business several years ago as a result of an enormous product liability judgment which was assessed against him. Although Mr. Rogers was not negligent in the manufacture of his product in any way, this judgment against him resulted from the vicissitudes and mercurial nature of current State law. His experience illustrates the problems created when our system attempts to compensate victims of an accident by forcing manufacturers to be the insurers of their products.

In concluding, I would just like to note that our current chaotic and conflicting State tort law system benefits no one—not manufacturers and not consumers. At the present time, being injuried by a product in this country is something like en-

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[2] Priest, "The Best Evidence of the Effect of Products Liability Law on the Accident Rate: Reply," 91 Yale L.J. 1386 (1982).

tering a lottery. If you live in the right State at the right time, you might win. But if you live in the wrong State you might lose this lottery even with an identical injury from the very same product. For example, women with delayed manifestation injuries have been barred from recovery in Oregon because of that State's eight year statute or repose. And asbestos victims in New York have been barred from court by that State's refusal to recognize a discovery rule for such cases. Injured persons in Louisiana are refused punitive damage awards and Missourians who contributed in any way to their own injuries are totally barred from recovery.

Thus, current law is no more fair to claimants than it is to manufacturers and major changes, many of them of the type embodied in S. 44 as it is presently drafted, are required.

Mr. ROGERS. In 1975, our company was subjected to a rude awakening. We had been in the business of making and developing systems for the safe handling of hazardous material for some 45 years. We have had an exemplary record, but we had a tank trailer that had been 10 years on the road, probably 1 million miles, and it was involved in a horrible accident. There was evidence the driver had been speeding.

At that time, the investigation by the State and Federal Government, the National Transportation Department, had proved there was nothing wrong with our product. However, as a result of that accident, we had a $50 million judgment against us and other defendants. About half of that ended up being awarded against us, not because the jury intended it that way, but because of the concept of strict liability and other problems in Texas law at that time.

This accident resulted in our insurance premiums being raised from some $22,000 to $650,000. It eventually resulted in our going out of business. The product was judged defective based on an artist's drawing. This was the only evidence that something was wrong with it; an artist's drawing of a trailer with a lowered center of gravity. By the way, it was both illegal in the State of Texas to build one like the hypothetical design and it would have been an unsteerable design of the product as well.

The tragedy was compounded because my father, who had been so dedicated to safety, and particularly to safety in his designs, and had even received many awards for his innovation, had a stroke very soon after the judgment because he just could not understand it. Being wiped out financially several times in the past had not been a problem for him, but seeing the injustice of this legal system and what it did to us had that effect.

There is a key point I would like to make here. First of all, as a manufacturer——

Senator KASTEN. Could I ask you to summarize?

Mr. ROGERS. As manufacturers, we do not want the pendulum to swing from one extreme to the other. We just want to move it a little bit toward the center from where it is now. As manufacturers, we do not want to destroy a plaintiff's legal right to sue. We will be a plaintiff, too, in some cases. We are for fairness and we are for responsible competitors and responsible suppliers, not for one extreme or the other, like it is now.

Thank you.

[The statement follows:]

STATEMENT OF ROBERT D. ROGERS, SENIOR VICE-PRESIDENT, LUBBOCK MANUFACTURING CO.

My name is Robert D. Rogers. I am the Senior Vice-President of Lubbock Manufacturing Co. in Lubbock, Texas, a business which was started by my father in 1933. Since 1945 my family had been in the business of manufacturing containers for the safe storage and transportation of hazardous materials.

Today Lubbock Manufacturing Co. exists in name only for the purpose of providing information updates to our customers who still own Lubbock products. Our manufacturing business was financially destroyed as a result of a $20 million judgment against us in a product liability action in 1977.

While Lubbock Manufacturing Company had been subject to several minor compensation claims over the many years that we were in business, this was the first major lawsuit regarding product liability.

The lawsuit stemmed from a tragic accident that occurred in 1975 involving a tractor-trailor carrying propane gas. Our company had manufactured the transport trailer involved in the accident.

At the time of the accident, it was owned by Surtigas, S.A., a Mexican company. On the day of the accident, the tractor-trailer was being driven by a driver who had never driven it before; the regular driver had refused to drive, allegedly because of the condition of the truck. The truck, which pulled the transport trailer, was manufactured by International Harvester and the first plate at the back of the truck, to which the trailer was attached by a metal pin, was manufactured by the Fontaine Corporation.

It is known that the driver of the tractor-trailer, employed by Surtigas, had been speeding on this particular run. As he entered the town of Eagle Pass, a car suddenly pulled out in front of him, causing him to swerve sharply in order to avoid a collision. When the truck swerved, the flat plate attachment broke off and the trailer came apart from the truck. The trailer fell over on its side and slid forward from the force of gravity until it hit a concrete bridge abutment. The trailer with its compressed tank of propane gas maintained its integrity until the sharp point of the bridge abutment pierced the tank causing the propane gas to ignite.

The resulting explosion killed several persons, injured many others, and destroyed a building. The National Transportation Safety Board (NTSB) later investigated the accident and made various recommendations regarding lowering speed limits, prohibiting parked cars on the side of the road, widening the road shoulders, and upgrading the concrete abutment. The NTSB did not, however, find any problems with or recommend any changes in the quality of the tank trailer manufactured by Lubbock. Lubbock trailers fully met the standards set by the American Society of Mechanical Engineers as required by the U.S. Department of Transportation and the Texas Railroad Commission.

Surtigas, the owner of the tractor trailer, and Fontaine, the manufacturer of the flat plate, were both named as defendants in the resulting lawsuit, along with Lubbock. Although the jury was not aware of this fact, Surtigas had settled prior to the trial for $1 million, the limit of its liability insurance and Fontaine had settled for $5 million, the limit of its insurance policy. Lubbock's product liability insurer had refused to settle, however, because its investigation of the accident revealed no problems with the quality of Lubbock's product. Under something known as a "Mary Carter" agreement in Texas law, both defendants were to be reimbursed out of any judgment rendered against Lubbock.

The basis of the claim against Lubbock was that the transport trailer had been defectively designed because a lower center of gravity would have been safer. At the time of the accident and up until this day, the Lubbock trailers have the lowest center of gravity of any in the industry. This was one of the unique selling features of our trailers and the reason that our product was so widely respected among our customers.

At the trial, the plaintiff's "expert" witness prepared an artist's rendering of a hypothetical design of a trailer with a lower center of gravity, suggesting that this would have been a preferable design. In fact, a trailer designed to the suggested specifications not only would have violated Texas law, but would have been completely impossible to steer.

Nevertheless, the jury found that Lubbock Manufacturing Company was 25 percent responsible for the harm. At the same time, it found that the flat plate used to hold the tractor and the trailer together had been defectively welded and found, therefore, that Fontaine was 75 percent responsible for the accident.

The judgment against the defendants was $50.1 million, the highest award in the history of Texas. Later the judgment, which had to be paid solely by Lubbock as the only defendant who had not settled prior to trial, was lowered to $20 million.

$20 million was the limit of our product liability insurance policy. Prior to the judgment, in 1976, our product liability insurance premiums cost us approximately $22,000 per year. In 1977-78, following the accident, the premium increased to $650,000 for the year. Lubbock also spent approximately $1 million over a two year period in costs and management time to defend the lawsuit. All of our key engineers and sales people were required to spend most of their time just providing information and assisting our insurer in the defense of the suit. The company was eventually forced to use its equity to pay its insurance costs, the loss of this capital resulted in our line of credit being cancelled, and finally we had no choice but to sell the assets of our conpany for the amount of the outstanding debt.

My father, the President of Lubbock Manufacturing Co., never recovered from the shock of the incident. For years he took pride in the fact that he made the best and safest product on the market and that he had received awards for outstanding design engineering. The fact that he was held legally responsible in any way for this tragic accident was more than he could bear. He suffered a stroke shortly after that judgment and never was able to fully participate in the business again.

My family and I had nothing but the deepest heartfelt sympathy for the victims of this terrible tragedy. Yet the consequences to my family and our business only compounded the tragedy. The demise of Lubbock Manufacturing Co. did not benefit anyone. In my mind, it was the lawyers and our current legal system which must be held responsible for the bankruptcy of the business which my family struggled to maintain for over 50 years. Using legal terminology such as strict liability, we were held liable for millions of dollars in damages, despite the fact that neither our conduct nor our product could, in any real sense, be considered responsible for the accident.

I support the passage of S. 44 because I believe that it would have reversed the outcome in our case. It creates certainty in the law where none exists now, and it holds people responsible for the consequences of their own actions rather than for the actions of others.

It is my observation that our curent legal system, by making legitimate and careful businesses uninsurable, actually forces these companies either to act irresponsibly or to go out of business, thus failing to protect the very people the system was intended to help—the consumers.

Senator KASTEN. Mr. Rogers, thank you.

The last witness on this panel is Mr. John Eppel of the Lawyers Advisory Committee to the Business Roundtable. Mr. Eppel.

Mr. EPPEL. Thank you, Mr. Chairman. I am appearing today on behalf of that group. I have submitted a written statement which is quite a bit longer than the one I intend to read, and I will try to summrize it quite quickly.

Senator Kasten. Your written statement will appear as part of the record along with the written statements of all witnesses today.

Mr. EPPEL. Fair and balanced product liability law reform at the Federal level is of utmost importance to the BRT. During the process of shaping S. 44, many modifications have been made to accommodate a variety of concerns. To some degree, these changes represent less substantial reform than had been urged by many of us. Nevertheless, we have reviewed the October 1983 changes, and we believe that the bill appropriately addresses critical problem areas in the tort liability system and should be supported by all interested parties.

The bill clearly establishes a fault based or negligence test for liability in cases alleging defective design or failure to warn. In our view, these have always been the areas most in need of uniform legislative reform. It is fair to say, and you have heard much about it this morning, that there is substantial doubt whether those who first formulated the concept of so-called strict liability in the early

and mid-1960's gave any real thought as to how it would develop in the context of design and warning cases.

In 1965, in section 402(a), the doctrine of strict liability was created by the ALI. Anyone who sold any product which was in "defective condition, unreasonably dangerous," would be liable even though all possible care had been exercised. The meaning of 402(a) and the phrase "defective condition, unreasonably dangerous" has been a source of consistent controversy ever since. S. 44 recognizes strict liability as originally formulated can be meaningfully applied in the case of defectively manufactured products which do not conform to intended design. The defectiveness of the individual unit can be detected and understood by comparing it to the original design upon which it was based. In contrast, objective standards or guidelines upon which to evaluate the defectiveness of a complex design and the process which produced it are usually lacking.

Under a negligence or fault based standard, the manufacturer's conduct and that, I would like to emphasize, is what the design process involves, conduct, can be compared to that of the ordinary reasonably prudent person.

Mr. Chairman, Professor Powers has described the confusion existing among the appellate court opinions regarding the role of fault in the various formulations of strict liability and I have included a number of examples in my prepared testimony. I do not intend to read them here. What should be obvious, however, is that judicial confusion and intellectual arguments over the application of strict liability to the judgmental design process is magnified several fold when it is articulated at the trial level to lay jurors who must then apply it to a wide range of individual fact situations.

In today's litigation world, this has boiled down to the experts for both sides voicing their sometimes highly technical opinions regarding product safety or lack thereof. The jury is left without any real guidelines other than the relevant impressions of the expert's manner and demeanor. In contrast, S. 44 expressly allows jurors to test the manufacturer's design decisions and related conduct against a simple standard of reasonable prudence.

This would, it seems to use, yield far fairer and more predictable results. Individuals may differ about how to apply the concepts in particular circumstances, but most of us at least understand the ideas embodied in reasonable care and prudence. Moreover and, I believe, most important, application of those concepts would provide better guidelines to those who in the first instance must try to design acceptable products that will not create liability. In our experience, reputable manufacturers want to exercise care and prudence in the design of their products and the preparation of warnings and instructions about their safe use and operation.

However, it is frustrating when those efforts are judged by the hindsight disparate policies that make up today's doctrine of strict liability. I might add that I fail to see how an unascertainable or more confused doctrine such as strict liability will produce or act as an incentive to produce safer products. We believe that as modified, the statement of fault based liability contained in sections 5 and 6 remains good social policy and urgently needed reform.

In our view, when manufacturers are given a clear and realistic picture of their duties and obligations under tort law, the end result will be even safer products and fewer accidents and injuries.

Mr. Chairman, if I may, I would like to address one comment that was made earlier with respect to the preemption provision of the bill and the suggestion that harm would involve commercial litigation. I think that the draftsmen had already anticipated that in the definition of harm which does exclude expressly commercial injury, so that the hypothetical of two manufacturers suing each other under this bill, I think, is not really accurate.

Thank you.

[The statement follows:]

STATEMENT OF JOHN P. EPPEL, ASSISTANT GENERAL COUNSEL, FORD MOTOR CO.

Mr. Chairman, My name is John Eppel. I am an Assistant General Counsel of Ford Motor Company and a member of the Lawyers Advisory Committee to the Business Roundtable's Product Liability Task Force. I am appearing today on behalf of the Advisory Committee.

Fair and balanced legislative product liability law reform at the federal level is of utmost importance and the hard work and efforts of the Chairman, Mr. Gorton and Committee staff are very much appreciated. During the process of shaping S. 44, its predecessor S. 2631, and the various Staff drafts that have preceded and followed both those bills, many modifications have been made to accommodate a variety of concerns. To some degree, these changes represent less substantial reform than was urged by many of us. Nevertheless, we have reviewed the October 1983 changes to S. 44 and, we believe, that the bill continues to appropriately address critical problem areas in the tort liability system and should be supported by all interested parties.

Despite changes in Sections 5 and 6, the bill still clearly establishes a fault based or negligence test for liability in cases alleging defective design or failure to warn. In our view these have always been the areas most in need of uniform legislative reform.

It is fair to say that there is substantial doubt whether those who first formulated the concept of strict liability in the early and mid-1960's gave any real thought as to how it would develop in the context of design and warning cases. In 1965, the American Law Institute in Section 402A of the Second Restatement of Torts, reviewed case law that had been developing in California and elsewhere and adopted the doctrine of strict liability. Anyone who sold any product which was in "a defective condition unreasonably dangerous" would be liable even though all possible care had been exercised. The meaning of 402A and the phrase "defective condition unreasonably dangerous" has been a consistent source of controversy ever since.

At first, 402A and strict liability appeared to be little more than a minor expansion of res ipsa loquitur, without some of the technical restrictions on that doctrine. The theory seemed to be that if a product was defectively manufactured, it was apparent that a mistake had been made at some point in the manufacturing process. Obviously, the injured person should not be left uncompensated simply because of an inability to identify that mistake.

It soon began to emerge, however, that the implications of strict liability were far greater when the allegation was not that the product was defectively manufactured, but rather that it was defectively designed. As S. 44 recognizes, strict liability can be meaningfully applied in the case of defectively manufactured products which do not conform to intended design. The defectiveness of the individual unit can be detected and understood by comparing it to the original design upon which it was based. In contrast, objective standards or guidelines upon which to evaluate the defectiveness of a complex design and the process which produced it are usually lacking. Under a negligence or fault based standard, a manufacturer's conduct—and that is what the design process involves—can be compared to that of the ordinary, reasonably prudent person. In a strict liability design case, however, reasonable care is, or is at least said to be, irrelevant and there is usually no other standard with which to compare the design of the product to determine whether it is defective.

Today, there is substantial unanimity in holdings that a manufacturer can be held strictly liable for defects in design. Nevertheless, the difficulty of applying that concept is exemplified by the variety of ways that various courts have articulated

the concept. The Pennsylvania Supreme Court, for example, has held that under strict liability a manufacturer is the "guarantor" of the safety of his product, and can be held liable if the product lacks any element necessary to make it "safe". The meaning of the word "safe" is, of course, left to the speculation of individual juries.

The California Supreme Court has gone even farther. That Court in *Barker* v. *Lull Engineering Co.* did recognize that the design of a complex product involves a course of conduct in balancing any dangers involved against the benefits of a particular design choice. Certainly the recognition of a portion of the real world design process—that it involves balancing or trade offs between various goals was encouraging. However, the California Supreme Court also felt constrained by the rebric of strict liability to emphasize that the exercise of reasonable care or prudence in the design process was still irrelevant.

There are other examples and indeed many have suggested that some formulations of strict liability continue to include a test of "reasonableness." It should be obvious, however, that judicial confusion and intellectual agruments over the application of strict liability to the judgmental design process is magnified several fold when it is articulated at the trial level to lay jurors who must then apply it to a wide range of individual fact situations. In today's litigation world this has boiled down to experts for both sides voicing their sometimes highly technical opinions regarding a product's safety or lack thereof. The jury is left without any real guidelines other then their relative impressions of the expert's manner and demeanor. In contrast, S. 44's provision allowing jurors to test a manufacturer's design decisions and related conduct against a simple standard of reasonable prudence would, it seems to us, yield far fairer and more predictable results. Individuals may differ about how to apply them in particular circumstances, but most of us at least understand the concepts of reasonable care and prudence.

Moreover, application of those concepts would provide clearer guidelines to those who, in the first instance, must try to design acceptable products that will not create liability. In our experience reputable manufacturers want to exercise care and prudence in the design of their products and the preparation of warnings and instuctions about their safe use and operation. However, it is frustrating when those efforts are judged by the hindsight disparate policies that make up today's doctrine of strict liability. We believe that, as modified, the statement of fault based liability contained in Section 5 and 6 remains good social policy and urgently needed reform. In our view, when manufacturers are given a clear and realistic picture of their duties and obligations under tort law, the end result will be even safer products and fewer accidents and injuries.

Mr. Chairman, I would be remiss, however, if I did not point out that we continue to be disappointed that the bill fails to deal with extremely important issues raised by the interplay between civil tort law and government safety standards and regulations. As I testified in July of 1982, the most specific and direct judicial call for congressional product liability reform has come with regard to government product safety requirements. [*Dawson* v. *Chrysler*, 630 F.2d 950 (1980)] Indeed, the Report accompanying S. 2631 enumerated a number of the very real problems that appeared to exist in this area. Without belaboring the issue, we continue to strongly believe that the Congress should address the anomalies created when lay jurors are allowed to second guess the considered technical judgments of federal government safety experts.

Thank you.

Senator KASTEN. Mr. Eppel, thank you very much.

The committee will resume a 5-minute rule for questions, and we will try to get through at least two rounds with this panel, and then we will go to the next panel.

Mr. Teitz, are you a member of the American Trial Lawyers Association?

Mr. TEITZ. Yes, I am.

Senator KASTEN. And is your practice when you are not in the legislature primarily as a trial lawyer?

Mr. TEITZ. It is a general practice. It includes both trial and nontrial elements.

Senator KASTEN. Does your membership in your association—do you believe your membership in the association influences your testimony here today?

Mr. TEITZ. No; my views influence the organizations that I choose to be a member of.

Senator KASTEN. As I understand it, your statements relate to a resolution that was adopted by the State Federal Assembly of the National Conference of State Legislatures. Is that correct?

Mr. TEITZ. That is correct.

Senator KASTEN. I am saying this because there is considerable question as to whom you speak for today. We have been contacted by a number of people who were part of your group who say that you should not have been allowed to speak before us today. I do not want to get into the kind of warfare between different State legislatures, but I simply want to point out that there was a resolution, I understand, that was adopted by the State Federal Assembly of the National Conference of State Legislatures. It does not represent an official position of the conference. Is that not correct?

Mr. TEITZ. That is not correct. The State Federal Assembly is authorized to adopt policy positions between the national conventions of the National Conference of State Legislatures which occur every summer, and NCSL through its legislators and through its staff actively participates in congressional debate on a great myriad of issues where the SFA has taken a position, but that issue has not come up because of the fact that the full NCSL only meets once a year.

Senator KASTEN. I understand you would be voting to take a position on this issue at your meeting this summer. Is that wrong?

Mr. TEITZ. No, the SFA has voted to take a position, and we routinely act on the resolutions of the SFA, and I would add that in this case the resolution was adopted unanimously. I am certain that throughout the country there may be some individual legislators who hold differing opinions, but no State, and we vote by State, and the delegations consist of members who are sent by the leaders in the governing bodies of each State voiced opposition to this resolution when it was adopted in December.

Senator KASTEN. Just for purposes of the record, I want to point out that Walter Floss, who is a member of the New York State Senate, has, No. 1, objected to your characterizing your testimony as representing the State Federal Assembly of the National Conference of State Legislatures, and also that last April the New York State Senate passed a resolution asking that Congress find a product liability solution on the Federal level. I do not want to get into whatever controversies that are going on within the State Federal Assembly of the National Conference of State Legislatures except to point out for the record that there is some question, at least among some of your membership, as to on whose behalf you are testifying today.

Mr. TEITZ. May I respond to that, Mr. Chairman?

Senator KASTEN. Very briefly.

Mr. TEITZ. I would emphasize that it certainly does not surprise me that among the 7,000 State legislators throughout this country there are some who hold different views on this bill, just as on any bill that the National Conference of State Legislatures takes a stand on, but I would emphasize that the resolution authorizing me to be here today has been adopted by our standard procedure and

was unanimously approved by the SFA, which is our standard procedure.

Senator KASTEN. Ms. Langer, what is your view of the statute of limitations in S. 44?

Ms. LANGER. I think that is the only provision that we support, and if you would be willing to drop the rest of the legislation, we would come and fight for this bill. I think it is a very good provision.

Senator KASTEN. I share some of the frustration that Ms. Connelly talked about in that in the first draft of the bill we addressed the DES questions based on drafts that were coming in from a number of different places. It is not our intention to address that question, and we are anxious to work with you and others. It does sometimes seem that we are reading from two different pieces of paper, either that or we have just developed an adversarial system here in which one side simply does not listen to what the other is saying, and just continues to push forward with its points. One way or the other, I want to make it clear to you as I hope I made it clear to the previous panel, we do not want to get involved in these DES kinds of questions. We do not want to get involved in these asbestosis kinds of questions. These are separate questions apart from the problems that we are trying to address, and we are anxious to work with you and with others in terms of making that even more clear. You should note if you have read the legislation as it has developed that there were sections involved in these questions and they have been taken out.

Now, is it not true that the plaintiffs have recovered and are recovering in the DES cases and the Dalkon Shield cases in many States under a negligence theory? In other words, the negligence theory—that was the point that was made over here on asbestosis—the negligence theory is a theory. We are not attempting to change that negligence theory or, in your opinion, are we attempting to change that theory?

Ms. LANGER. You are not attempting to change the way some States treat negligence theory. Although there have been recoveries under negligence theory, others have occurred under the strict liability standard. There was one notable case in Oregon very recently where the jury found that the Dalkon Shield is a dangerously defective product, but failed to find negligence. As a result, the plaintiff in that case received no recovery despite a $295,000 jury verdict. The negligence standard, is a very, very serious bar to recovery in some of these cases.

Senator KASTEN. Senator Heflin.

Senator HEFLIN. Professor Bepko, warranty is a contract action, is it not, sir?

Mr. BEPKO. Yes, sir.

Senator HEFLIN. It is not a tort action. This proposed bill takes in not only tort but the issue of warranty which is a contract action, and in reading the preemption language it states that this act governs any civil action brought against a manufacturer or product seller, and it says for loss or harm caused by the product, loss or damage caused by the product—it does not say harm as it is defined herein.

Now, you raised the issue of what this does to warranty problems between businesses. Now, under the harm there is the exclusion from damages for commercial loss. It does include property damages. Is it clear in the field of warranty as to whether or not this in effect will govern all breaches of express and implied warranty that are brought under the UCC?

Mr. BEPKO. I do not think it was the intention——

Senator HEFLIN. I am talking about the language.

Mr. BEPKO. The language of section 3(b), and I disagree with my colleague, Mr. Eppel, here, the language of section 3(b) says that no person may recover for any loss or damage caused by a product except to the extent that the loss or damage constitutes harm. Harm is defined as personal injury or property damage or injuries of that kind. Harm does not include commercial losses.

Senator HEFLIN. In other words, you could be subject to the interpretation that you are abolishing commercial losses.

Mr. BEPKO. Well, as currently drafted, that is one reading of that language which clearly makes sense. I do not think, however, that was what was intended.

Senator HEFLIN. Well, this thing has been rewritten and rewritten and rewritten, and every time the draft comes back, there are real problems. No body like the American Law Institute or other than some paid lawyers have been involved in the drafting, and that is one of the real problems that has arisen. Now, this does away with implied warranty. Under implied warranty there warrant of merchantability, that the product is fit for the purposes for which it is sold. Now, can you give us a little bit in layman's language what that means?

Mr. BEPKO. Well, it means that in the context of the sale, under the description that is used to characterize the product, there is a certain set of expectations that are built for the buyer, and those expectations are protected. The catch phrase that is most often used is the goods are reasonably fit for the purposes for which they were intended. It is, as I said, governed by the expectations created in the transaction, the reasonable expectations in the buyer's mind.

Senator HEFLIN. Mr. Teitz, let me ask you this. As I interpret this language and the areas it is getting into, it appears that it is not only getting into the State law dealing with torts, but it invades contract law, subrogation insurance, which many insurance companies have endeavored to keep out of the Federal area, and workmen's compensation. This, in effect, is a foot in the door for a Federal workmen's compensation law.

Mr. TEITZ. I cannot speculate on the motives of the sponsors, but I can certainly say the National Conference of State Legislatures is concerned that this type of mammouth intrusion, and we cannot locate anything in the past which has constituted nearly as sweeping a preemption in an area of tort law that has historically been reserved to the States as S. 44 would represent, and therefore we are very concerned that it may be the start of a lengthy process of preemption in that area.

I would like to add to your comment, Senator, that the major rules which are overturned by S. 44 have been enacted by the legislatures and by the supreme courts of the States and on the major issues addressed in this bill there is quite a consensus. Well over 40

States have strict liability in tort. They have looked at the issues involved, and one after another they have made the decision since the first case in 1963 of Uba products that that is the appropriate way to go as a matter of policy, and similar policy decisions have been made on these other issues, and what is proposed in S. 44 basically changes the common law consensus. It does not just extend it to the few States that have lagged behind, so it created tremendous upheaval in tort law of the States.

Senator KASTEN. Senator Gorton.

Senator GORTON. Ms. Connelly, you have, I think, accurately outlined many of the changes which have been made in S. 44 since the time of its original introduction. I wonder if you believe that there are any more changes which would be appropriate given the frame of reference and the general philosophy which it is designed to express.

Ms. CONNELLY. I think that the bill as it stands now sets a very good standard for liability. If there are areas in which people still feel that there is confusion, it is possible that they could be spelled out with even further clarity, but one does wonder how much more clear you can be. For example, in section 3 on the preemption issue, it does say that:

> [a] civil action for loss or damage caused to a product itself or for a commercial loss is not a product liability action and shall be governed by applicable commercial or contract law.

I think the bill does try in every way to clarify areas of possible uncertainty.

Senator GORTON. That would be your answer to Senator Heflin?

Ms. CONNELLY. Yes, I think it is spelled out there. Now, if there are areas where there is still confusion, maybe they can be further clarified, but actually what we have here is much more clearer and much more uniform than what actually exists in State law today. It is easy to say 40 States have adopted strict liability, but the standards they have adopted are all different. Strict liability in construction defects; yes, States have adopted this and so does S. 44. Let us not forget that S. 44 is a strict liability bill for construction defects and for misrepresentations, and it is true that that is the majority rule in the States, therefore, S. 44 is adopting majority law. When it comes to design defects and failure to warn cases, however, I do not believe from my survey of the law and from other surveys that strict liability is actually the law of the majority of States. If you look at the way courts actually test for an unreasonably dangerous product, you find, in a very roundabout fashion, they often get back to considering the conduct of the manufacturer, and if that is what we are really doing, why not do it straightforwardly? I think S. 44 is a very straightforward approach to the problem, and therefore it provides some clarity and some uniformity that does not exist at the present time.

Senator GORTON. Thank you for that answer. I want to say, incidentally, that I appreciate your bringing Mr. Rogers with you, and his written testimony particularly is a graphic illustration of how present laws in at least one State, although they can be generalized much more broadly than that, simply do not necessarily work to produce a just answer to complicated questions.

I do want to ask you one other set of questions, though, and that is to the way in which you feel that this bill if it becomes law will work procedurally. For example, in an adversity case in Federal court, will the court be required to apply the law of the State in which it sits to fill in the gaps left in the bill, or will Federal courts begin to develop a Federal common law in this field?

Ms. CONNELLY. It is clear that States will be able to apply their own law in those areas that are not covered by S. 44. This provision is also spelled out in the preemption section of the bill. With some of these common law doctrines that the bill adopts, like the reasonably prudent person standard, there is a common understanding as to what that means, and that meaning will still be applied. S. 44 takes a doctrine like that and includes it as the standard, and then the interstices are filled in by State common law.

Senator GORTON. Even if the Federal court—will the Federal courts develop their own Federal common law?

Ms. CONNELLY. I believe that the Federal courts will continue to do what they do now. Where the issue is not addressed by Federal law, they must apply State law.

[The following information was subsequently received for the record:]

COALITION FOR UNIFORM LIABILITY LAW,
Washington, D.C. March 14, 1984.

Hon. ROBERT KASTEN,
Hart Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: Thank you for providing the Coalition for Uniform Product Liability Law an opportunity to present testimony at the March 5, 1984 hearing on S. 44, the Product Liability Act. We would like to expand our response to one of the questions posed at the hearing because we believe it needs further clarification.

Senator Gorton asked whether, in a diversity action, the federal courts would be free to apply "federal common law" to determine issues not addressed in S. 44.

Generally, the meaning of terms used in S. 44 would be a question of federal law and would be so construed on the basis of the legislative history of the Act. And even though the Act may employ a concept also present in state law, federal decisional law construing the term will control. The precise issue was involved in *Urie* v. *Thompson*, 337 U.S. 163, 174 (1984), where the Supreme Court considered the meaning of the term "negligence" as used in the Federal Employers' Liability Act. The court held that:

"[w]hat constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs."

The above rule, however, applies only when the issue in question is one addressed by the federal law. When the issue is not addressed by federal law, federal courts in a diversity action must apply the appropriate state law. As the Supreme Court stated in *Erie* v. *Tompkins*, 304 U.S. 64 (1937), "[t]here is no federal common law (emphasis added)." Thus, any gaps in S. 44 are to be filled with relevant state law, regardless of whether that law is decisional law or statutory law.

Finally, although in diversity actions procedural issues are governed by the Federal Rules of Civil Procedure, state practice or procedural rules which "significantly affect the result of a litigation" must be followed by federal courts. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). Of course, in the case of S. 44, this would be true only if such state rules governed an issue not addressed in the federal statute.

We hope that this information provides a fuller and more complete response to Senator Gorton's inquiry and ask that this letter be made a part of the hearing record.

Thank you again for allowing the Coalition to testify at the hearing and for your continuing firm commitment to a uniform product liability law.

Sincerely,

JEANNE CONNELLY.

Senator GORTON. Mr. Teitz, I really had this question for Judge Pope, but I did not ask it of him, and either you or perhaps Professor Bepko can answer this question for me. I assume that each of you believes that the Nation's economy is more efficient by reason of adoption by almost all of the States of substantial portions of the Uniform Commercial Code. If the States had failed to adopt the Uniform Commercial Code, would you have opposed its imposition on the States by Congress?

Mr. TEITZ. My response to that is, because the Uniform Commercial Code had a great deal of substantive merit, it was within a relatively short period of time adopted by the State legislatures one after another. Similarly, a number of the products liability rules that are presently in force throughout the country such as strict liability in design defect cases as well as in construction cases have within a relatively short period of time since 1963 when *Greenman* v. *Uba Products* was decided, have adopted that rule. I do not believe that there is the great disparity on these major issues that the proponents of the bill suggest. Certainly the States are not 100 percent in lock step, but I think if you are familiar with the common law consensus in these areas, there is quite a strong consensus on the major issues, and S. 44 as presently drafted does not reflect that consensus. It would radically alter it.

Senator GORTON. Professor Bepko, would you comment?

Mr. BEPKO. The lack of uniformity that gave rise to the movement to create the uniform commercial code I think was a little different than may exist in this field, although again, I am not a products liability expert. The lack of uniformity in commercial transactions was such that it was extraordinarily difficult to deal in commercial transaction from State to State because of the vagaries and nuances of the laws of the State, particularly with respect to secured transactions.

As a result, I think that most people in the commercial field were very anxious to see some uniformity. Now, it happened that the uniformity was created through the UCC by the National Conference of Commissioners on Uniform State Laws of the American Law Institute, and State legislatures. This is a process which I think has done an extraordinarily good job at creating this sort of model and proposed uniform legislation. But I suppose if they had not done that, if it had not been successful, that it certainly would have been worth considering creating a Federal commercial law. There have been a number of people who have proposed it, and it is not in and of itself an idea to be rejected, I think.

But the process by which the uniform commercial code was created is one that has, I think, much to commend it. It is a slower process than congressional action, but it is a sifting process that takes place over a number of years, I think this process has served the commercial law well.

Senator GORTON. Thank you, Mr. Chairman.

Senator KASTEN. Thank you, Senator.

I am not sure that I heard your answer, Mr. Teitz, to Senator Gorton's question. He said would you and other members of the American Trial Lawyers Association be lobbying against a uniform commercial code if there was not one in place right now.

Mr. TEITZ. With all due respect, Senator, I do not think that is what he asked at all. I am here today as a representative of the Nation's State legislators and not the ATLA. And his question, I think, was clearly directed to me in that capacity, asking me what I think the response of the legislators of this Nation would be.

I think their response would be that they feel that that would be inappropriate; that when there is a clear solution in an area such as the UCC where the majority of States, the overwhelming majority of States, see that the substantive rules proposed are fair and that there is a need for uniformity, they act with haste in enacting it; and therefore, that is the proper process.

If there was a perception throughout the State that the present products liability system is either unjust or that the uniformity is creating—there was a lack of uniformity which was creating serious national problems, I think you would see the States acting to adopt a model product liability bill in the same manner in which they adopted the model Uniform Commercial Code.

The fact that they have not I think indicates that they do not perceive that there is this type of problem, as they did perceive it with the Uniform Commercial Code.

Senator KASTEN. Well, I think it is important to point out that in the—I guess beginning in 1952 and going on through the Uniform Commercial Code was, first of all, developed and then adopted basically State by State by State. A lot has changed, but in the late 1970's under the Carter administration, as most of the people in this room are aware, a uniform product liability bill was proposed. At that point it was suggested to the State legislatures—and in every one of the States that I am familiar with, the American Trial Lawyers Association, through their contacts in the legislature, lobbied hard and worked hard against that particular--it became the No. 1 bill that the trial lawyers groups were talking about, worrying about. It became a bill in which we were separating lawyers from trial lawyers.

But because of their interest in the legislative process—and as you know, you are not at all unique in being a trial lawyer who is also a legislator—because of the close relationship between the trial lawyers and the legislators and their interest in political politics, State, by State, by State, the State law was blocked. And in many cases—and the one in Pennsylvania is the one I can remember best, because I had the trial lawyer that testified against the State law in Pennsylvania at a previous hearing. He said it does not make any sense for us in Pennsylvania to adopt a law, because a large number of the products that are sold in Pennsylvania are not in fact used in Pennsylvania. Therefore, I, as a representative of the Pennsylvania trial lawyers group, am opposed to a Pennsylvania product liability law, suggesting that he would favor a Federal law, because that would cover all the products.

But we have got a significant change in the political atmosphere vis-a-vis the activity of the American Association of Trial Lawyers from the 1950's to the 1970's, and in my opinion, that has a good bit to do with the fact that we have been unable to adopt a uniform law. Just as a contract ought to be read and understood State, by State, by State, a product manufacturer's responsibilities ought to be understood, and a consumer's right and responsibilities ought to

be understood, and a wholesaler's rights ought to be understood State, by State, by State.

That is not a question; it is simply a statement. But I would like to ask Ms. Connelly if she would comment on the testimony that strict liability creates greater incentives for safety than a fault-based or a negligence standard. It was suggested by, I believe, Mr. O'Reilly, and it has also been suggested as part of this panel that somehow people are going to be more concerned about safety under the other kind of a system.

Ms. CONNELLY. I just cannot understand how that would be true. I have talked to a number of business people around the country, people who serve as risk managers and people who serve as product-safety experts, and what they have told me is that they are experiencing a great deal of frustration. This is because no matter what they do, if they take all reasonable care, if they are somehow going to be found liable despite all reasonable care, it makes their jobs much more difficult and very frustrating.

I do not see what anyone can do beyond taking all reasonable care to increase product safety. Now, the bill takes some positive steps to increase product safety by eliminating evidence that a manufacturer has improved their product from being used to prove a prior design defective. And I think that this step should go far to increasing product safety.

Right now there is actually a disincentive to improving your product or making safety additions because you know that that fact is going to be turned around and used against you in court. Therefore, I feel that this provision of S. 44 is a progressive step that will certainly encourage more safety in products. But beyond requiring all reasonable care, it is not clear what more could be gained by imposing liability beyond that standard.

Senator KASTEN. Senator Heflin.

Senator HEFLIN. Mr. Teitz, you are a member of the American Trial Lawyers Association?

Mr. TEITZ. Yes.

Senator HEFLIN. Are you a member of the American Bar Association?

Mr. TEITZ. Yes.

Senator HEFLIN. What is the position of the American Bar Association on this bill?

Mr. TEITZ. I honestly do not know that.

Senator HEFLIN. They opposed it. The American Bar Association historically is generally construed as a conservative body.

Mr. TEITZ. That is certainly correct, Senator.

Senator HEFLIN. Now, I was asking you about the foot in the door relative to a Federal workmen's compensation and, of course, you brought out some examples of injured Federal employees in which we have it, but I am talking about what has been predominantly within the jurisdiction of the States.

If you were to have a Federal workmen's compensation law, and you had changes in administration, or if Ralph Nader comes to the forefront, this law is subject to being amended, isn't it?

Mr. TEITZ. Certainly it is.

Senator HEFLIN. The Federal workmen's compensation laws could raise some similar issues as to manufacturers, employees,

and interstate commerce wanting to know their different positions, just as well as employees wanting to know what their rights are.

The area of Federal preemption encompasses a large field, and historically, the tort field has been felt to be an area that has been left to the States, and there have been mistakes in other areas. But the forum for change in those things has been through the State legislatures. Maybe it is a little difficult to seek a remedy through 50 different mediums, but it seems now that everybody wants a Federal cure. Sometimes Federal cures turn out to be Federal diseases.

And based upon your experience, I guess in this area you elect people who are closest to the people; is that not correct?

Mr. TEITZ. I think that is correct, and I think those concepts are as valid today as they were when they were established by our Founding Fathers two centuries ago. If we are going to have a Federal system, part of the price of that Federal system—and we in the National Conference of State Legislatures believe that it is a price well worth paying—is that there will not be absolute uniformity from State to State.

We have today in many respects a national economy. Businesses, products cross State lines. Business activities cross State lines. If that argument is going to suggest that, therefore, all the rules in all areas that govern business rules such as workmen's compensation that you referred to have to be national in order for the national economy to work properly, then we really might as well tear up a large part of the Constitution, which is based on federalism.

The model of the UCC is the way to go. It may not be as quick as some of the proponents of Federal legislation would like, but it is the route to take if you believe that there is a need for substantive change in products liability laws. It is the route that is consistent with our whole Federal tradition.

You know, the States are really 50 different laboratories to test various social and economic policies. And in those States we see over time that some ideas take hold and that they are proven to be valuable ones, and therefore, other States pick up on those ideas, and you get, before too long a period of time, what is really a national standard. But it has been adopted the way under our system of government it should, not by what is really a blatant usurpation by the Federal Government of an area of law that has always been left to the States.

What this bill is doing is really limiting citizen access to State courts, and it is telling State courts how they could adjust and adjudicate the disputes between those individuals over whom they have jurisdiction, between manufacturers who choose to do business in that State, and individuals who may be injured by the products that they purchase within the States.

And that, I submit, going far beyond the particular issues of products liability law, is not the way the system is supposed to operate and is not keeping faith with the Federal traditions of our Constitution and our form of government.

Senator KASTEN. Senator Gorton.

Senator GORTON. I have no questions.

Senator KASTEN. I would like to thank you, members of the second panel. As before, there may be questions coming from mem-

bers of the committee, and we would ask that you respond to those questions in writing.

The next panel is Mr. Popper, Mr. Clark, and Mr. Ellis.

Senator GORTON. Mr. Chairman, Senator Trible could not be here and asked me to apologize for that fact. He has a statement on punitive damages, which I gather is the subject of this panel.

Has it been submitted to you, or may I submit it for the record?

Senator KASTEN. We will ask that the statement be made a part of the record at this time as we begin the panel on punitive damages.

[The statement follows:]

STATEMENT OF SENATOR TRIBLE

PUNITIVE DAMAGES

Good morning. I pleased to be here this morning. The issue before the subcommittee—enactment of a Federal Product Liability Act—has in one form or another been under consideration since 1979. The record is clear. We must enact product liability rules to apply uniformly in all actions.

I was particularly pleased to work with Senator Kasten, Senator Gorton, and Senator Lautenberg in drafting the portion of the bill that relates to punitive dan .ges. This section assures that a defendant manufacturer or product seller will pay punitive damages when its conduct merits punishment. At the same time, it resolves some of the problems associated with assessing punitive damages in product liability cases.

Prior to 1970 only one appellate court upheld a punitive damage award in a product liability case. By 1976, there had been only three reported appellate punitive damage decisions in product liability cases, and none of the awards exceeded $250,000.

Today that trickle of punitive damage awards has produced a flood of claims. The tens of thousands of such claims awaiting trial threaten to engulf American business, and, according to one eminent professor, "the increasing number and size of such awards may fairly raise concern for the future stability of American industry." In 1982 alone there were nine reported appellate decision which each exceeded $1 million.

Manufacturers of such diverse products as tire rims, cars and various drugs face thousands of punitive damage claims for a single corporate mistake.

Furthermore, the problem of punitive damages in not limited to large corporations. According to one small business executive who testified before this committee, "punitive damages, which were generally not sought in our earlier product liability cases, now are routinely claimed in lawsuits filed against us. Since these damages sometimes far exceed whatever compensatory damages are allowed, we are literally betting the keys to the company that we will prevail in such cases."

Multi-million dollars punitive damage awards have become so commonplace that several commentators have urged a thorough reform. I am pleased that we have one distinguished professor who champions this view, Dan Ellis of the University of Iowa, with us today.

My proposal, the key elements of which are drawn from the scholarly work of Professor Ellis, Professor David Owen of South Carolina, and Professor Malcolm Wheeler of Kansas, is a necessary reform in order to save a significant segment of American business from being overwhelmed by punitive damage claims.

My amendment resolves the problem of repeated or multiple punishment. It is important to note that punitive damages, by definition, do not serve a compensatory purpose. The claimant has already been compensated for loss of wages, medical costs, and pain and suffering. Punitive damages do, however, serve a societal purpose—to punish a defendant and to deter others from engaging in reckless conduct. Punitive damages in a civil case are analogous to a fine or sentence in a criminal case.

However, under the double jeopardy clause of the bill of rights, repeated punishments for a single crime are prohibited. For defendants in product liability cases, repeated punishment is possible. Where a defective product is made and sold on a large scale, a defendant may face thousands of punitive claims for a single corporate mistake.

The threat of multiple punishment for a single course of conduct is as unfair to business as it is to a criminal defendant. Further, the threat of multiple punishment poses a serious concern to injured claimants and to society: multiple punitive awards may deplete a defendant's assets before all injured persons have recovered their compensatory damages.

In response to this problem, we propose that punitive damages be assessed only one-time for a single course of conduct. This will serve the public interest in punishment and deterrence without subjecting the defendant to multiple punishment.

Punitive damages should not be a windfall to a particular claimant. A claimant who has received compensatory damages for his harm has recovered for the loss which the law recognizes. There is no policy reason why any individual should receive an additional award.

It is appropriate, however, to provide an incentive to claimants to pursue punitive damage claims. Therefore, section 12 proposes a one-time assessment of punitive damages that may, in the court's discretion, include a distribution to the claimant in an amount not to exceed compensatory damages. The rest will be distributed for a public purpose in furtherance of the national interest in health, safety, education or the environment. In this way, the societal goal of punishment and deterrence benefits society in general, and each individual has a financial incentive to seek punitive damages in appropriate cases.

The amount of the one-time punitive damage assessment should reflect the nature and gravity of the defendant's conduct. In other words, it should be an amount that truly punishes and deters egregious conduct.

To ensure this, S. 44 again looks to well-established criminal law procedures: it requires the jury to determine whether the defendant engaged in reckless conduct and, if the jury so finds, the judge will determine the amount of punishment. This bifurcated procedure parallels criminal practice in which the court's role in "sentencing" the defendant takes place after the jury has determined liability.

The issues of liability for punitive damages and amount of punitive damages should be separate. My approach will keep them separate and will ensure that evidence of the defendant's wealth is heard only by the court in determining the appropriate amount of punishment to be imposed on a defendant found liable for engaging in reckless conduct. Otherwise, a jury, upon hearing about a corporate defendant's assets, may be unfairly prejudiced and inclined to find a liability when evidence of reckless conduct is not present.

There is one more aspect of section 12 which draws on criminal law. In criminal cases, proof of the defendant's guilt must be established beyond a reasonable doubt. In civil cases, only proof by a preponderance of the evidence is required. Punitive damages in a product liability case is essentially a hybrid—a quasi-criminal sanction in a civil case. For this reason, proof of the defendant's guilt should be established by an amount of proof that lies between the traditional criminal and civil standards—proof by clear and convincing evidence. This will assure that errors in assessing punitive damages are minimized, and it is the standard applied in a growing number of States.

In sum, section 12 requires the jury to find that the defendant acted with reckless disregard for safety and, thus, should be punished. The judge will then take evidence relating to the appropriate amount of punitive damages and will distribute the assessment primarily to a public purpose. That assessment of punitive damages bars all other claims based on the same wrongful conduct.

Without this system, punitive damages law will continue to damage corporations, without serving a compensatory purpose for the large majority of plaintiffs. Multiple punitive damages will certainly punish and deter these corporations, but they might drive them into bankruptcy as well. We must develop a new system of punitive damages which will adequately punish and deter egregious corporate conduct, but will not cause lasting damage to the enterprise. Justice is not served when jobs are lost, tax revenues are reduced, and economic activity slows.

My amendment establishes such a system. Furthermore, it advances the public interest in health, safety, education, and the environment, while also ensuring that each individual plaintiff is compensated for his efforts and has adequate incentives to pursue his punitive claim.

This amendment carefully balances the public interest in safe products with the public interest in preserving the businesses which manufacture these products and the jobs which depend upon them.

Senator KASTEN. We will continue under the same basic ground rules that we have been adopting, although it is possible this time

there will be a chance for only one round of questions from the panel.

Our first representative or our first panel member is Prof. Andrew F. Popper of the American University, Washington College of Law.

Mr. Popper.

STATEMENTS OF ANDREW F. POPPER, PROFESSOR, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW; JAMES E. CLARK, ATTORNEY, BIRMINGHAM, ALA.; AND DORSEY D. ELLIS, JR., PROFESSOR, UNIVERSITY OF IOWA

Mr. POPPER. Thank you very much, Senator.

I will be addressing the October 19 draft of S. 44. I do not oppose a national standard in the field of product liability law, though I do not believe that uniformity is a sacred cow. There is striking diversity in this field. However, any Federal law that preempts 200 years of State law, preempts legal concepts tailored to individual regions and to local values, any law which radically intercedes with the power of the State courts and interferes with State constitutional provisions, that changes substantive rights, eliminating some and creating others, has to pass careful scrutiny by this Congress. It cannot be a crude and unjustified intrusion based on the apparent power of the Congress. The question is: Does this draft measure up to the standards of fairness and justice?

The October draft, particularly in the punitive damages section, fails to pass this test. It is a crude intrusion, not a welcomed or enlightened approach in this very difficult field.

In my written statement I have addressed several sections of the bill. I will confine these comments to the punitive damages provision, section 12. The first problem involves the standards for the granting of punitive damages. Presumably, what the Congress would have in mind for any standard in this area would be to identify a medium point based on State law. This draft uses the standard of reckless disregard, which is in fact a median standard and commendable. It then goes on to define "reckless disregard" as "conscious," meaning knowing presumably, and "flagrant" indifference and "extreme" disregard. These concepts are foreign to State law in some cases, raising a question of their placement in the draft. However, that is by no means the most serious problem with this legislation.

This legislation would allow for punitive damages to be awarded only to the first plaintiff who has punitive damages awarded, either through litigation or through a settlement process. All subsequent plaintiffs, regardless of the degree or scope of their injury and regardless of the enormity of the misconduct of the manufacturer are barred from receiving punitive damage claims.

To justify this, one must assume that subsequent plaintiffs are "persona non grata." That they have been injured by the defendant's product (and now we are not dealing with the refinements in design defect; we are dealing with gross misconduct and reckless disregard) seems to be lost in the assessment. The interests of subsequent plaintiffs are not irrelevant to the awarding of punitive damages.

Notwithstanding that the general purpose of punitive damages is punishment and deterrence, this type of first plaintiff limitation eliminates ongoing deterrence. It rewards recidivist behavior. It is an unprincipled limitation that will create a race to the courthouse and impossible judicial interstate management problems.

Will State court judges be able to issue stays in other States to insure they are dealing with a first plaintiff? Will parties after this initial claim begin to negotiate settlement from the top of their compensatory damages, which would be the absolute limit under this draft and negotiate away their actual expenses after they have been injured by someone's reckless or gross misconduct?

Will the public be denied an opportunity of finding out the true risk inherent in the product? Often, the first case in the products liability area is just the tip of the iceberg. The drama is as yet to unfold. Through the pressure of subsequent litigation stimulated by the incentive implicit in punitive damages, we learned the true risks pertinent to the Dalkon Shield; we have learned about DES; we have learned about black lung. We have learned various industrial risks through the litigation process. This bill will create disincentives to that process.

Even more than that, the comprehensive resentment and distrust of our judicial system, under attack for its slowness and its expense, will grow with yet another valid criticism: preference and inequity through the creation of a bizarre lottery that rewards the first plaintiff but denies all others. If this subcommittee is truly concerned with uniformity, I cannot understand why it would put forward this type of provision.

Next, what happens to the money in excess of the receiving party's compensatory damages? It goes into a creation of a trust that would be impossible to manage, raise State jurisdictional questions, and create a morass of State law that would take us half a century to untangle.

The States are going to be in competition for first awards if the money can be put to any general public purpose as the draft suggests. A complex and costly bureaucracy would have to be created by the State courts to administer these trusts. A patchwork of nonuniformity will be the hallmark of this proposed particular provision of the legislation. Finally this draft ignores that there are State court judges who impose rigorous constraints on punitive damages.

You did not allow victims to appear in this hearing today, but you allowed a financial victim to appear in this hearing today. I would contend that if you want to talk about punitive damages and their effects, the appropriate people to ask are those second and third and subsequent plaintiffs who have, in fact, been injured.

This provision relating to punitive damages is a damaging, counterproductive, expensive illogical mess. It is so counter to public policy that it seems to be a red herring. It is here, to draw fire from the more important sections of this draft, on the more critical sections of this draft, which are more subtle and require our attention. It is wrong for the Congress to take its time with this kind of least common denominator and not even a lowest common denominator perception of victims rights.

As to the other sections of this bill, there are several portions meriting discussion. This is a bill that changes the standard for design defect. It is a bill that relieves nonmanufacturers of strict liability. It is a bill that affects the rules of evidence in terms of a postproduction remedial information.

Senator KASTEN. I would ask that you summarize your comments, Mr. Popper.

Mr. POPPER. Thank you.

This draft will not achieve uniformity because of its complexity and its biased language. It will interfere in a crude and unjustified manner with principles of State law in the punitive damage area. Rather than codifying State law, an entirely different animal is being created for punitives. It creates a standard that favors the manufacturer, with no valid public policy objective. It adds no protection to anyone other than the manufacturer.

I recommend the rejection of this portion of the bill and serious consideration of other portions.

Thank you.

[The statement follows:]

STATEMENT OF ANDREW F. POPPER, PROFESSOR OF LAW

AN ASSESSMENT OF S. 44, THE PRODUCT LIABILITY ACT OF 1984

My name is Andrew F. Popper. I am a Professor of Law at The American University Washington College of Law. I direct the Program for Advanced Studies in Federal Regulatory Process at the law school. I teach courses in torts, antitrust, administrative law and federal regulation. Prior to coming to this law school, I held an endowed chair at the University of Denver College of law, teaching in the areas of torts and various regulatory fields. Before that I was in practice with the United States Government.

Introduction

I am honored to have been asked to testify before this Committee on the October 19, 1983 draft of S. 44. This draft is designed to create a federal standard in the area of product liability. If the bill passes, it will pre-empt the law of all fifty states in the product liability field. States will not have the option of imposing a more rigorous scheme to protect their residents. Accordingly, the responsibility of the Congress is to insure that this bill represents a balanced and fair piece of legislation that protects the interests of those who are most vulnerable in this field.

Given the enormous responsibility of the Congress in proposing a measure which would destroy centuries of carefully evolved case law, every part of this draft must be given careful attention. A bill of this nature must insure that there are workable incentives for improving product quality; clear and understandable measures for pursuing relief after a person sustains an injury from a defective product; a workable and understandable calculus for liability which can be uniformly applied in each state so that fault is not ascribed arbitrarily nor are the injured left with no appropriate compensation.

The purposes that would justify the promulgation of a national product liability bill are clear: expeditious and effective compensation systems, maximization of incentives to upgrade product quality and clear and understandable means to determine if the defendant is in fact responsible for an injury. Unfortunately, the October 1983 working draft of S. 44 was not written with these objectives in mind. The bill has no stated purpose. The actual objectives are self-evident from the dominant sections of S. 44. They include gross evisceration of punitive damage claims; interjection of defendant based negligence standard instead of a product based design standard in strict liability design cases; elimination of new and necessary theories of collective responsibility such as market share theory; an increase of the burden of proof on plaintiffs in design defect cases, failure to warn cases and punitive damage claims; revival of thoroughly repudiated doctrines, for example the fellow servant doctrine and assumption of risk; elimination of wholesaler responsibility for strict liability barring unusual circumstances; and, prohibition against plaintiffs introduc-

ing evidence in product liability cases that is useful in determining the nature of a product.

It is quite evident that this legislation was the result of careful and lengthy debate. Viewing the history of S. 44, it appears to have started out as a bill designed to advantage the manufacturing community. To the credit of the authors of the October 19, 1983 drafts, the present legislative proposal represents a more progressive and balanced approach than any other prior effort. In a number of areas, the bill reflects the state of the law as applied by many of the states. In no area, however, does it provide injured persons with rights not presently available in many states. Instead, it opts for minimum standards in some areas and wholly eliminates protections in others.

Product liability law in the United States is not uniform; different states have different systems reflecting different values. A well crafted bill that appropriately addresses the basic issues in the product liability field would deserve serious attention. S. 44 is not such a bill.

Punitive damages—The operation of section 12 and critique

I have been instructed to give attention to Section 12 of the Product Liability Act which involves punitive damages. The principle provisions of this section alter tort law throughout the United States. Unlike other sections of the bill which seek to replicate the position of a majority or a minority of states, the punitive damages material is different from the law in any state. If Congress passes this legislation, it must consider that it is abolishing affirmative law in every state. In eliminating the collective wisdom of several hundred years of decisionmaking, the burden on the Congress is substantial. To justify its action, the Congress must put forward legislation that improves existing state law. In this instance, the proposed legislation would eliminate an entitlement carefully guided and circumscribed by state law. Thus, Congress must have a strong and convincing rationale to justify its action.

Section 12 operates in the following manner. If a manufacturer or product seller has been liable for producing a defective and unreasonably dangerous product, plaintiffs who have filed appropriate pleadings can then seek punitive damages. This determination shall be made by a judge, not a jury, a crude intrusion into carefully guarded state prerogatives. The plaintiff must show by clear and convincing evidence, not the conventional standard of preponderance of the evidence, that the defendant's activity was the result of a reckless disregard for the safety of the product users or others. Reckless disregard is defined in the Act as a "conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice." This standard is at odds with the law in many states which permit punitive damages for gross negligence and do not require proof that the activity constitutes an "extreme departure" from accepted practices. Though this standard is more restrictive than the requirements of many states, it is not patently offensive.

Assuming the plaintiff can meet the aforementioned test, the court may then consider factors that relate to "the likelihood that serious harm would arise," conduct taken by the manufacturer after discovery of the harm, or concealment of the harm. Evidence can be submitted relating to the profitability of the conduct to the manufacturer (as opposed to a more meaningful assessment of the profitability of the product), information regarding all other "claims" against the manufacturer whether they relate to punitive damages or not, the total resources of the manufacturer or defendant, the nature of the harm caused to the plaintiff, and the "total effect of other sanctions imposed on the manufacturer." After all these matters are considered, the manufacturer will be permitted to introduce evidence of post-manufacturing improvements. The maximum amount of punitive damages cannot exceed the total of compensatory damages in any individual case, a provision inconsistent with the law in a vast majority of states.

If the court finds that punitive damages are merited in an amount beyond the compensatory damages, the court must then pour over the excess into an elaborate and complex protective trust system. In Section (f) of the punitive damages material, the drafters suggest the creation of a bureaucracy that would absorb excess punitive damages and direct those resources to an activity that is consistent with "the national interest in health, safety, education or the environment". Rather than having the money go to the person injured by the defendant's outrageous conduct, or having the money go to a state or federal agency which has an organization presently engaged in product safety research, the drafters would have the resources go to an entirely new body which would be reporting back to the courts of the different states on an irregular and disjointed basis. There is nothing to insure that these

funds will be directed to product safety research. Instead they may be allocated to general public purposes, a wholly irrational approach.

The trust system captures a good deal of the direction of the punitive damages material in this draft. It operates on the presumption that the plaintiff in a product liability case who proves up a basis for punitive damages is somehow a disinterested party who has no apparent entitlement to the punitive damage award. Like the system described below which limits punitive damages to only the person fast enough to bring suit first, the "punitive damages trust" would operate as a massive disincentive to plaintiffs to pursue punitive damages claims, a component of product liability litigation that has the recognized purpose of deterring future incidents and creating incentives for improved product quality. Limiting punitive damages to the maximum of compensatory damages is not inherently offensive. However, to limit punitive damages to the maximum of compendatory damages in all cases (which is at odds with state law) and then to limit punitive damages to only the first claim brought, and then to create a bureaucracy that removes the plaintiff from the picture demonstrates that the protected party in this section is the defendant, not the plaintiff.

It is illogical to create a bill designed to set up a uniform system of product liability law (a most benevolent presumption of the purpose of this bill) and ultimately up create a mechanism that eliminates punitive damage claims in all but one situation. This illogic is not excused by creating a research organization designed to do for the defendants that which they have refused to do for themselves: independent research on product quality.

There is nothing intrinsically wrong with the creation of a trust which is designed to stimulate research on product safety, although there is no assurance that this will be the trust purpose. However, to create such a trust at the expense of those who have been injured by products that have been made or sold, with "reckless disregard" by manufacturers or sellers who demonstate "conscious, flagrant" misbehavior is fundamentally wrong. Plaintiffs are not personal non grata in the domain of punitive recovery in personal injury law. Plaintiffs receive awards for punitive damages because they have been injured by a party so grossly at fault that an award capped only by compensatory damages seems inadequate. To divert these resoures into a system which will require expensive administration already carried out by various agencies and organizations is wasteful at best. More likely, such a system would serve only to discourage persons from seeking punitive damages. If that the intent of this section, then it should be stricken from this draft.

After consideration of the trust issues raised above, the bill goes on to make clear and specific limitations on the number of plaintiffs who can receive punitive damages. As stated above, only the first plaintiff who prevails in a personal injury action and receives punitive damages and has that award approved by a court of appeals (or does not appeal) will receive punitive damages in any one product liability setting. Further, this role might be played by persons who have concluded a contested matter by settlement, so long as the settlement is approved by a court.

It is not unrealistic to think that plaintiffs injured by products will race to the courthouses, one in competition with the extent, for only the first to gain a settlement or an approved award can receive any punitive damages. According to the statute, all others are barred. As a matter of public policy, this limitation on punitive damages is so thoroughly offensive that it is hard to know what motivation the manufacturing community might have had in pursuing this particular provision. If it is predicated on the assumption that plaintiffs (beyond the first recipient) who are entitled to punitive damages are somehow unimportant actors in personal injury cases, then the perception of the drafter reflects a misunderstanding of the legal system. Persons who are injured by activities that would justify punitive damages make their claims based on the wrongs they have sustained, wrongs that in many cases could have been avoided but for the conscious disregard of the plaintiff's interests. While it is true that punitive damages serve to create a deterrent and punitive component in the products liability calculus, they also serve in a much more fundamental way to provide plaintiffs whose injury is gross and unjust with a resource which in small part can assist them in rebuilding their lives.

The target of Section 12 appears to be the imposition of multiple punitive damage awards. There could be no other explanation for the single party limitation. That being so, it bears noting that the awards granted to each individual plaintiff are granted only after each individual plaintiff has demonstrated the onerous standards set out in Section 12 and also complied with the direct cause requirements implicit in this draft. In short, each plaintiff must show both the outrageous and reckless conduct of a defendant and how that outrageous conduct caused the plaintiff injury before the award will be approved. This pattern is not wholly inconsistent with the

law in many states. Most states have made it extremely difficult for plaintiffs to collect punitive damages, and any honest survey of jury awards over the last 20 years will demonstrate that punitive damage awards have been moderate and in many cases insubstantial. Rather than following the very conservative pattern that has been established for punitive damages in the United States, the drafters have chosen an approach that eliminates a central deterrent in the products liability system.

Some years ago, the Second Circuit dealt with this question of multiple awards. Judge Friendly declared in dictum that he "knew] of no principle whereby the first punitive award exhausted all claims for punitive damages and would thus preclude future judgments." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832 (2nd Cir. 1967). Further, it must be remembered that in awarding punitive damages the defendant has been at least grossly negligent and more commonly has acted with clear disregard to the safety of others, and in particular, disregard to the person injured.

Punitive damages, without exception have always been awarded on the basis of the defendant's conduct. Thus, when a manufacturer has acted with wilful disregard toward a great number of persons, there is no reason to punish the defendants to the benefit of only the first plaintiff. Again *Roginsky* is instructive:

"While jusisprudes might comprehend why [a plaintiff] in California should walk off with $250,000 more than a compensatory recovery and Roginsky in the Southern District of New York and [a third plaintiff] in Westchester County with $100,000, most laymen and some judges would have some difficultly in understanding why presumably equally worthy plaintiffs in the other 75 cases . . . elsewhere in the county should get less or none."—*Roginsky*, 378 F.2d at 840.

The apparent objective of 12(g) is to avoid financial deprivation through punitive damages. In many states, defendants' fiscal capacity is considered; in others, the principle concern is the underlying misconduct. These are important policy differences and those should not be ignored. For example, the Superior Court of Pennsylvania recognized in *Martin* v. *Johns-Manville Corporation*, 469 A.2d 655 (Pa. Super. 1983) it is no answer to say that because too many plaintiffs may exact too high a reward no plaintiff should exact any award. (Id. at 665.) The Court found sense in the reasoning of an Illinois Appellate Court:

"[W]e to not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous conduct, they have managed to injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages."—*Martin*, 469 A.2d at 665 (quoting *Froud* v. *Celotex Corp.*, 107 Ill. App. 3d 654, 658 63 Ill. Dec 261, 264, 437 N.E.2d910, 913 (1982).

It will not do to say that absent punitive damages a mounting number of claims will deter a manufacturer. For example, the Minnesota Supreme Court recognized, that just as the potential for compensatory claims with the incident loss of sales did not deter the defendant in the past, the realization of the claims will surely not deter the defendant now. *Gryc* v. *Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn.) cert. denied, 449 U.S. 921 (1980). Likewise, the court in *Martin* found itself hard pressed to reason why the court should not require the defendant to suffer the consequences of its own deliberate actions, regardless of the incursions into the defendant's profit base.

The punitive damage provision of the Products Liability Act discredits the capacity of state and federal court judges to provide for an intelligent and effective application of punitive damages. See *Wangen* v. *Ford Motor Co.*, 284 N.W. 2d 120 (Wis. App. 1979); see also *Roginsky*, 378 F.2d at 840 (preferring drastic judicial control of punitive damages to absolute limitation).

If we had a system that was based entirely on economic parity and not on fault based responsibility for misconduct, there might be some justification for the elimination of punitive damages which is accomplished by this section of the draft. However, we have a fault-based system at the heart of our common law. People are compensated or are denied compensation based on the degree to which their injuries are attributable to another's actions, and the degree to which that other entity's activities reflect inconsistency with public standards. For years, there has been an undercurrent in product liability law suggesting that economic loss should be the principle criterion for awarding damages. Under such a system, if an individual is injured by another, the costs of their injuries would be paid by those causing the injury without reference to the degree of fault involved. This system has never been accepted, and we live in a world where judgments are made about conduct and output which become the predicate for the assignment of responsibility.

At a less theoretical level, the elimination of punitive damages would have a devastating effect on all plaintiffs in all products liability actions. By making punitive damages unavailable to all but the first recipient, the bill would cause settlement negotiations to begin at the ceiling of compensatory damages. Plaintiffs, aware of the difficulties of litigation and also aware of the fact that manufacturers are often well financed and continuously represented by counsel, seek to avoid the litigation system by settling law suits. In the settlement process, plaintiffs begin to assess their damages by making a good faith claim on the maximum they might recover. This process is also undertaken by defendants and insurance companies. If this bill eliminates punitive damages as a component of product liability recovery in the appropriate cases (those in which disregard of interests is evident) plaintiffs will negotiate away compensatory sums to which they have a clear entitlement.

There is no debate regarding the role of negotiation and settlement in a product liability system by settling law suits. In the settlement process, plaintiffs begin to assess their damages by making a good faith claim on the maximum they might recover. This process is also undertaken by defendants and insurance companies. If this bill eliminates punitive damages as a compenent of product liability recovery in the appropriate cases (those in which disregard of interests is evident) plaintiffs will negotiate away compensatory sums to which they have a clear entitlement.

There is no debate regarding the role of negotiation and settlement in a product liability system. Commentators in every area agree that the avoidance of protracted litigation is consistent with the best interests of public policy. These settlements are not designed to strip the plaintiff of resources the plaintiff might need to survive. Elimination of punitive damages will cause plaintiffs who are compelled to move forward with settlement for a large number of reasons to engage in a process of negotiating away resources.

Elimination of punitive damages in a products liability world creates an unequal situation between products liability plaintiffs and all other plaintiffs. Without engaging in an assessment of the equal protection clause, suffice it to say that it is a gross unfairness that has vittually no justification other than the protection of manufacturers or sellers who would like to avoid responsibility for behavior that by the terms of the drafters of this very piece of legislation is "reckless."

A policy perspective on section 12 punitive damages

In looking at the immunity implicit (after the first award) in the punitive damages area, it strikes me that this section in particular represents an extraordinary deviation from tort law. While criticisms can be made of the other sections of this draft, most of those appear to coincide with the law of some or many states. By contrast, the punitive damages section does not comport with the legal system of any jurisdiction. Its authors must have been aware that it would draw a great deal of criticism because of its unique and extraordinarily onerous nature.

Given the unique nature of Section 12 and also given the fact that state law denies substantial hurdles to punitive damages in all but those cases where defendants engage in gross misconduct or wanton disregard, one is left wondering why this section has emerged at this late stage in the evolution of a national product liability standard. One explanation would be that this is the classical "red herring." It seems most unlikely that a Congress would deprive those who are injured by extreme and outrageous behavior of punitive damages. It seems more likely that much energy will be expended commenting on the controversial nature of this provision. The time and attention given to this unpassable section will detract from commentary on the more important and subtle remainder of this draft.

With the exception of extremely strident consumer groups and certain plaintiffs' lawyer, there is a growing consensus that the field of products liability would benefit from a comprehensive review. The problems which the proponents of the bill claim to want to address, specifically uniformity and efficient compensation, are problems that concern many divisions within the political spectrum. It makes good sense to spend time commenting on either a federal standard, or to engage in a similar discourse through a study commission. It makes good sense to invest energy through institutions like the American Law Institute that have the capacity to help create uniform systems that could be adopted. It does not make good sense to invest vast quantities of time on Section 12 of this draft when it is so inconsistent with the American legal system and creates such a direct and distinct deprivation.

I would support a careful and continuing review of some of the ideas proffered in the remainder of the October 19 draft. As this testimony reveals, many of these ideas reflect only the most minimal protections and are unsupportable as such. I do not support devoting congressional resources to Section 12 at the expense of careful reflection over the other portions of this legislation.

The punitive damages section also raises serious timing problems. The probabilities are too high that the first products liability case in a given area where punitive damages are awarded is just the tip of the iceberg. Indeed, the drama may just be unfolding. Limited resources of plaintiffs' lawyers and injured persons will not allow for a comprehensive industry study to determine all aspects of the production of a given product which might be relevant to punitive damages.

Unfortunately, we often learn about the most serious parts of a product's problems after several cases have been tried. In the automobile industry, the pharmaceutical industry, and in other areas that are highly sensitive to punitive damage awards, it cannot be denied that initial claims represent only the beginning of an inquiry furthered by a parade of injured persons. After a period of time, the evidence, produced through collective assessment of different trials, reveals the true patterns of a given industry. At that point, punitive damage awards may in fact rise in a given cases. Because such a system exists today, the incentives for safe production are continually present. Eliminating the incentive of continual risk of punitive damages will most assuredly reduce the general quality of consumer goods in the United States.

The abolition of jury process in the punitive damage section, which mandates that the judge's damage assessments draws different policy dimension in issue. Each state has considered this question, two state have produced state constitutional amendments on the role of judge and jury. To intrude on these judgments without giving deference to state law direct raises federalism issues. This notion of federalism is fundamental to our system of government. To interfere without compelling reasons is unwise and offensive.

Under this system, the judge is given the responsibility of deciding punitive damage questions, not as a case by case matter, but as a matter of social policy relating to dangerous products. A single judge decides what the ultimate "social fine" should be for the production of a dangerous product which was made with the requisite degree of reckless disregard. Upon presentation of the first punitive damages claim, a judge must determine how all of society will be effected by a punitive damages award that is to satisfy objectives of deterrence and punishment, as well as provide needed resources for a plaintiff.

There are other problems central to the imposition of responsibility at the state level implicit in Section 12, pertinent to the role of the state court judge. First, the draft contemplates the creation of a general "public interest trust" which may well have nothing to do with product liability issues. State court judges would be required to evaluate expenditures on environmental programs and other matters which are uniquely outside of the scope of judicial activity. Judges would be required to control trust purposes and insure that they were met. Administrative and record keeping responsibilities and costs would be staggering. A whole new body of law would evolve, undoubtedly on a state-by-state basis (not uniform) regarding these trusts.

Second, state court judges would have the responsibility of having national insight into ongoing product liability litigation. In light of the single plaintiff limitation, state court's would be required to issue "stays" over all other product liability litigation relating to the same claim or allegation. Without engaging in a debate about judicial power, this draft would have to be changed to provide the judges of each state the power to enjoin ongoing personal injury proceedings in every other state. Monitoring stays, determining, "which action began first" and other matters seem likely to create a tangled morase of conflicting judgments. It is hard to imagine a more unworkable system in this particular field. This kind of federal intrusion into state decisionmaking tears at the fabric of conventional federal-state relations. Given the lack of any justification for this intrusion, one is hard pressed to come to any conclusion other than to strike this entire provision from the October draft and proceed with review of the saner provisions.

[A discussion of the preemption question is discussed generally at a later portion in this testimony.]

In addition to the jurisprudential problems inherent in this system, some thought must be given to the apparent inequity of this provision. Injured persons who are advised that they will not receive punitive damages, not withstanding the outrageous nature of a defendant's behavior, because a few days earlier in another state another injured person received punitive damages, are likely to view themselves as victims of an unjust system. It is hard to imagine an educational program that would convince the population that this form of justice is proper and consistent with notions of fundamental fair play inherent in our system of Government. Instead, the system will be perceived as creating a bizarre lottery where fortuity will play a

dispositive role in the outcome of many cases. A judicial system under attack for its slowness and expense can hardly sustain such accurate and condemning criticism.

A comment on the admissibility of subsequent remedial measures

The treatment of subsequent remedial measures in the October draft permits such evidence to be introduced to aid defendants in the mitigation component of a punitive damages claim, but denies plaintiffs the opportunity to submit such evidence in the liability component of a products case. Subsequent remedial measures are actions taken by manufacturers after production to ameliorate defects and prevent further injury. Banning the use of remedial-measure evidence in the liability area is inconsistent with explicit decisions of several courts interpreting Federal Rule of Evidence 407, though there is a clear split between the circuits on this point.

Section 13 of the Act excludes from the jury "evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur. . . ." Section 12, to the contrary, provides: that "[n]otwithstanding the provision of section 13, a manufacturer or product seller may introduce relevant evidence of post-manufacturing improvements in defense of punitive damages." The apparent explanation for the contradiction is the varying purposes for which the evidence is offered, though there is considerable disagreement as to the validity of this approach.

The risk the October draft seeks to avoid is that evidence of a remedial measure will be inferred by the jury as an admission of culpability by the defendant. To prevent that admission, it must be presumed defendants would fail to make necessary repairs. The fear is often expressed as a concern over self-incrimination. In contrast, the policy behind section 13(a) on the other hand, invites the defendant to show that it has made every good faith attempt to remedy its wrong. Neither approach seems much more than public posturing. Fortunately, repairs are made post-manufacture and that information is valuable for both determining the nature of the product and the good faith of the manufacturer.

The validity of this evidence has been recognized by several courts with the central case coming from California, *Ault* v. *International Harvester*, 13 Cal.3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1974). In *Ault*, the plaintiff was injured when a vehicle in which he was riding plunged over the side of a canyon. The cause of the accident, although unclear, appeared to be a gear box made of aluminum 380, an alloy susceptible to metal fatigue. The plaintiff sought to enter evidence of International Harvester's subsequent substitution of a malleable iron gear box. The defendant sought to exclude the evidence under California Rule 1151, analogous to Federal Rule 407 in pertinent part. The California Supreme Court allowed the admission of the evidence for two reasons. First, section 1151 was not relevant in a products case which dealt with strict liability and ignored negligence and culpability. Second, consistent with a leading treatise in the area, the court found wholly unconvincing the exclusion policy in products cases.

"The contemporary corporate mass producer . . . manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggests that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse affects upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement."—(J. Weinstein and M. Berger. 2 *Weinstein's Evidence*, ¶ 407 [02] at p. 407.10 (1982).

Weinstein and Berger find further fault with the Rule 407, claiming it has only marginal justification in even negligence cases. The treatise notes that even if a defendant does understand the implication of the remedy or repair, the defendant is not likely to be deterred when inaction may cause further injury. The treatise also recognizes the inapplicability of Rule 407 to cases of strict liability in which negligence is not an issue.

Although the federal circuits are split on the applicability of Rule 407 to strict liability claims, those circuits that reject such evidence make no distinction between a negligence standard and a strict liability standard. Compare e.g. *Robbins* v. *Farmers Union Grain Terminal Assn.*, 552 F.2d 788 (8th Cir. 1977) (Rule 407, by terms, confined to cases involving negligence or culpable conduct) with *Werner* v. *Upjohn Co.* 628 F.2d 848 (4th Cir. 1980) (for Rule 407, strict liability indistinguishable from negligence).

Use of subsequent remedial measures evidence by states have been mixed. Here again, however, states that have treated the question in the products area with an analysis of policy have more commonly fund the exclusion of remedial-measure evidence needless. E.g. *Caprara* v. *Chrysler Corp.* 52 N.Y .2d 114, 436 N.Y.S. 2d 251, 417 N.E. 2d 545 (N.Y.Ct. App. 1981); See, *Siruta* v. *Hesston*, 659 p. 2d 799, 232 Kan. 654

(1983) and compare *Hohlenkamp* v. Rheem, 134 Ariz. 208, 655 p.2d 32 (1982). Iowa has gone so far as to codify the exception. "This [exclusion] rule does not require the exclusion of evidence of subsequent measures when offered in connection with a claim based on strict liability in tort. . . ." *Iowa R. Evid.* 407.

Although the law concerning admissibility of subsequent remedial measures in strict liability cases is in some disagreement, the drafters of the Products Liability Act have summarily opted for a rule which provides the greatest measure of safety for defendants. It is a lowest common denominator approach, providing the plaintiff with a rule that the court in *Ault* characterized as "merely a shield against potential liability."

Federal-State relations

At the outset of the October draft there is a provision which seeks to preempt state law in the field of products liability. Through some fairly explicit provisions, the draft seeks to eliminate the existence of state law and substitute in its place the federal guidelines. Preemption is not an uncommon phenomenon, as is easily demonstrated in the fields of nuclear power, other forms of energy regulation, and much of the economic regulation in the United States. However, the October draft is involved in preemption of a very different nature. Instead of preempting the applicability of state law because of a pervasive federal need which causes the Congress to establish a regulatory system, or vest exclusive jurisdiction in the federal courts (patents and antitrust for example) the October draft simply wipes out state law, and inserts federal guidelines in its place.

The preemptive provision in the October draft leaves no latitude for the states to interpret the most fundamental issues in the products liability area. The draft creates a standard which is substantially different from state law in some areas (punitive damages) and at variance with the law of a number of states in other areas (design defect). Since this legislation is written with the explicit purpose of abolishing differential state courts judgments, the burden on the Congress is to establish that the preemption is justified based on "pervasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Cogress has unmistakely so ordained". *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 173 U.S. 139, 142 (1863). It is difficult to imagine a regulatory program of such a powerful nature that it would justify the abolition of state court law and require the imposition of Congressional mandates on the premise of interstate commerce without attendent of federal jurisdiction either by federal agency or federal court.

Unlike federal initiatives in the water quality area which establish minimum standards to be applied by the states, this legislation establishes the only standard for the states to apply. Without initiating a debate on the federalism questions inherent in this area, one might pause to think about the implications of this type of system. Could the Congress pass standards for nuclear power safety, and then demand that state courts license nuclear power plants, giving the state courts "legislative guidelines?" Hardly. Further, once federal law is made, amendment and change based on the political composition of the Congress become a regular, and expected process.

The proponents of this bill seek the best of both political worlds. On one hand, under the banner of "giving it back to the states" the proponents would have the states implement a system which will be unpopular to the vast percentage of the citizens of the states, and which will abolish all of the collective wisdom of those states in the products liability area. On the other hand, under a separate banner, Congress can claim that it has advanced national interests of uniformity. Without creating any new regulatory structures, the Congress gets the opportunity to express its will but not the obligation to implement that preference.

Uniformity of itself is not a compelling federal interest. Courts have time and again recognized that diversity among the states encourages vigorous debate, experimentation, and useful innovation of the common law. Statutorily imposed uniformity can only lead to constriction and stagnation. For this reason courts presume against federal preemption. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141–43 (1963). The Supreme Court on more than one occasion has approved a system guaranteed to create diversity of law among the states when the interest involved was historically state protected. E.g., *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974).

State court treatment of products liability claims is widely disparate. I support an effort to deal with this disparity. However, given the considerations just raised, and the burden on the Congress, it seems evident that this draft does not justify the cost to our federal system. For example, the draft is rife with novel phrases and standards. The import of these standards do not appear to introduce any new concepts to

products liability jurisprudence. Given the stated goal of uniformity, it remains a mystery why the drafters opted for untested language in lieu of existing phrases and standards which have produced known quantities and results.

Implicit in this type of activity is the power of the Congress to express not just a preference but an absolute guideline for state law. In a sense, the Uniform Product Liability Act would be read into the state laws of every state. It would not have to be affirmed by state legislatures nor adopted by state courts, though these would be the more conventional device when such uniform standards have been proffered in the past by groups outside of the Congress.

I am not opposed to the objective of creating uniform standards in the product liability area. However, I do not believe that this bill is the best way to create uniform standards.

Review of various other sections of the Product Liability Act

The invitation to prepare this testimony was received five days before this hearing. In light of the brief time between the invitation and the hearing, it was impossible to give extensive commentary on every section of the October draft. What follows is a review of several provisions of the October working draft.

Design defects: A State law perspective

The October draft uses a conventional negligence analysis to deal with design defects. In order to prevail design defect case, a plaintiff must prove that the manufacturer knew or through the exercise of reasonable prudence should have known about the defective design. In addition, the plaintiff must prove that a reasonably prudent person in similar circumstances would not have used the design in question. (Section 5(b)(1).)

This is a complicated way of stating the negligence option in the design defect area. The complexity does not end with the above criteria. A defendant can respond to this evidence by showing that there was no alternative practical technologically feasible design available, or that if there was, the benefits and usefulness of the product outweigh the probability of the risk inherent in the defective design.

These standards are not unfamiliar in the product liability world. They represent a very distinct line of cases in the design defect area in which negligence and conduct based assessments have replaced products centered assessments. By contrast, a number of states are far less concerned with the "difficult choices" the manufacturer has to make, and far more concerned with the fact that a design defect has resulted in a dangerous product which has caused a serious injury.

To be sure, there are far more onerous ways of stating the negligence theory in the design defect field, as is adequately demonstrated in the prior drafts of § 44. Further, it is safe to say that the state of the law and the design defect area is uncertain. Some states such as Colorado, New Jersey, California and Florida have expended tremendous judicial resources in exploring and developing plaintiff-centered product liability approaches. In such states, design defect cases are assessed based on the defective design of the product, not on the choices of the manufacturer and the reasonability of the judgment of the manufacturer at the time the product was manfactured. Demonstrating compliance with industry standards does not constitute a defense, and in some instances, does not constitute relevant evidence in these jurisdictions.

In other states such as Texas, New York, South Carolina and Illinois, a different approach has been adopted. In these states, the conduct of the manufacturer is more important then the nature of the defect and the nature of the risk implicit in the product. In this group of states, products are not deemed defective if their performance is at odds with rational consumer expectations about product safety. While the drafters confronted this dichotomy and selected, in most portions of this bill, the states which could be construed as protective of manufacturing interests, they did not, outside of the punitive damages area, develop entirely new law. However, the language used is somewhat novel. Lest there be no misunderstanding, Congress should not believe that the fact of a Federal statute will create a uniform interpretation. In the jurisdictions mentioned above, several states in both categories applied the language of Section 402(a) of the Second Restatement of Torts and came up with substantially different results.

State differences are notable in several areas. For example, there has been considerable debate over the question of whether a manufacturer's compliance with the predominant and practically feasible industry custom constitutes a defense in the design defect area. A certain group of states has decided that compliance with industry custom, given considerations of practicality of production and risk of loss, represent appropriate industry behavior which cannot be the basis of a design defect case. Those states then go on to say that that is essentially the state of the art prod-

uct development. A federal court, evaluating that particular phenomenon came to the conclusion that "if state of the art is understood to simply mean the custom and practice in an industry . . . then compliance with such a standard does not constitute an absolute defense to a products liability action. (*Smith* v. *Minster*, 669 F.2d 628 (10th Cir. 1982), interpreting Oklahoma law.)

Other states have gone to great lengths to separate state of the art and custom in design defect cases, compelling an assessment of the inherent nature of the product, rather than assessing the judgment of a manufacturer. (See *Elsworth* v. *Beech Aircraft*, 195 Cal. Rptr. 226, (Cal. App. 2nd Dist. 1983)). Still another group of states has taken the area of design defect away from the question of consumer expectations and moved into the area of absolute liability. (*Beshada* v. *Johns-Manville*, 447 A.2d 539, 90 N.J. 91 (1982)). In the world of absolute built liability, New Jersey is the uncontested leader, with the *Beshada* case being the battle cry of the proponents of this bill.

The alleged horrors of absolute liability have caused the proponents of the October draft to demand adherence with cases like the *Boatland of Houston* v. *Bailey*, (699 S.W.2d 743 (S.Ct. Texas, 1980)) which used a state-of-the-art defense which had all the earmarks of industry custom. In this debate over the appropriate standard for product safety law, the proponents of this bill have contended that a *Boatland* standard is an appropriate expression of public policy. While it is true that *Boatland* represents a distinct position in the design defect debate, it is also a case about an individual who was fatally mutilated when run over by an outboard motor in an accident which could have been avoided by installing a safety switch. The fact that the device was not in common usage and was not available in a commercial context prevented the family of the decedent from receiving anything.

In the design defect world, the anti-*Boatland* forces are far more comfortable with the California approach found in *Barker* v. *Lull Engineering*, 573 P.2d 443, 143 Cal. Rptr. 225 (1980). *Barker* is a case that insists on product centered assessments, and deems irrelevant industry custom. If the Congress gets into the business of selecting between conflicting theories on the question of design defect, it should at least recognize that the position taken in the October draft is the *Boatland* position, not the *Barker* decision. As to which of the two represents "the best public policy", that becomes a political choice. While I have no difficulty rejecting *Boatland* as being a somewhat inhumane approach, I recognize that to be a policy preference, and not one born out of indisputable legal directive. It should be clear that many of these choices boil down to expressions of policy with the central issue being whether to adopt a system which gives an injured person, or a manufacturer the edge in a products suit.

Design defect is the litmus test of the products liability world. The choice made on standards for design defect in a state, or in a piece of federal legislation, is probably central to identifying the protective regime that dominates the particular state or legislation. At the present time, there is no question that the regime best protected by the October draft is that of the manufacturing community.

My guess is that every witness who has been asked to testify on the recent incarnations of S. 44 will consider whether New Jersey's excursion into absolute liability in the *Beshada* case represents good public policy. From my perspective I am satisfied that the New Jersey case represents good public policy for that state at this time. However, I do not think that the New Jersey Supreme Court is the ultimate repository of wisdom in this field and the criticism of this case is often quite compelling. Those who believe that New Jersey has become the bastion of plaintiffs' recovery should pay attention to the post-*Beshada* cases (see particularly *O'Brien* v. *Mushkin*, 463 A.2d 298, 94 N.J. 169 (1983) where the positions of the dissenting judges reflect growing dissatisfaction with the *Beshada* case; *Michalko* v. *Cooke Color and Chemical Corporation*, 451 A.2d 179, 91 N.J. 386 (1983).

Market share liability

One particularly controversial area of product liability law which was not addressed in the October draft involved the *Sindel* case. *Sindel* v. *Abbott Laboratories*, 163 Cal. Rptr.132, 607 P.2d 924, cert. denied 449 U.S. 912 (1980). The case involves the somewhat unusual problem of an industry which produces a product in a uniform manner which is defective. For reasons that have to do with the product (particularly in the pharmaceutical area) it is impossible to identify the individual manufacturer. Under these circumstances, when the defect manifests in the product, it is impossible to tell which of the manufacturers "caused" the injury. The *Sindel* court resolved this problem by making liability dependent on each manufacturers' share of the market at the time of production, rather than on direct cause. Given

that failure in causation, and the explicit requirement of causation in S. 44, market share theory would collapse if the October draft were to be adopted.

The preemption paragraph in the October draft makes it clear that product liability cases can only be tried under the theories set out in the bill. Market share liability is a product liability theory relating to negligence and strict liability. It would have no continuing vitality if the October draft continues in its present form.

The theory of market share liability evolved because of a deficiency in the law. In *Sindel*, persons suffered serious medical problems because of the consumption of a product that is within the realm of the strict liability principles in most states. However, at the time the case was brought, there was no way of dealing with the inability of the plaintiffs to identify the specific manufacturer. To cope with the problem, the state court analyzed various multiple defendant responsibility theories and ultimately came up with the concept of market share. Such a provision represent novel state court resolution of a clear and discernible problem. The October draft would elimimate that solution and perpetuate suffering without appropriate compensation.

Various discussions with staff members in the days prior to this Senate hearing suggest that there was no intention to eliminate *Sindel*. I believe these statements are true. I also believe that any piece of federal legislation which bears the awesome responsibility of displacing state tort law cannot be seriously considered when such gross oversights are obvious in the very language of the text.

The exclusion of wholesalers and retail sellers

The October draft makes it clear that wholesaler and retailers cannot be held responsible in a strict liability action in the products liability area, outside of situations where the manufacturer is unavailable for service, or judgment-proof. Instead, such nonmanufacturers can only be responsible if negligence is demonstrated or if there is a breach of an express warranty. Even here, the language is extremely restrictive, requiring the plaintiff to prove there was a "reasonable opportunity to inspect" and that the inspection would have revealed the particular defect in the product. Presumably, this section has been included because non-manufacturers contend that they do not design products that they sell and therefore cannot control the structural integrity of those products. Notwithstanding that rationale, the overwhelming majority of courts "have extended strict liability to retailers." (Torts, Cases and Materials—7th edition, Prosser, Wade, and Scwartz (1982) at 825, n.2).

The October draft also eliminates the entire theory of implied warranty. This is done by the broad preemption paragraph at the beginning of the draft and then by the provision of no implied warranty information elsewhere in the draft. While one may understand the motivation of the manufacturing community in seeking to eliminate implied warranty, it is hard to believe that they also intended to abolish major sections of the Uniform Commercial Code. Nonetheless, that would be the effect of the October draft. The only provision relating to warranty in the October draft relates to express warranty.

The evolution of strict liability in tort has been heavily influenced by warranty and non-warranty concepts. A number of states have used the ideas underlying implied commercial warranty and expanded them to the point where the sellers of products, as well as manufacturers, become strictly liable if the products sold are defective and injure a third person, whether purchaser, user or other individual affected by the product. A second group of states have come to a similar conclusion through acceptance of 402(a). Suffice it to say that in a large number of states liability is imposed on commercial sellers, wholesalers and others placing the product into the stream of commerce, including manufacturers, if the product turns out to be defective, and by virtue of that defect, uneasonably dangerous.

The October draft alters in a radical manner the two principle lines of product liability law discussed above as they apply to non-manufacturers. Providing injured plaintiffs with recourse against non-manufacturers in negligence under the October draft provides injured plaintiffs with nothing they have not had for the last half-century. As in the design defect area, S. 44 and the October draft turn back the clock to a point in time when terms like "reasonable prudence" and "anticipated utiiization" left the states with a mixture of unpredictable outcomes.

Looking at the question of the public policy reasons to impose or not impose liability on non-manufacturers, the choice seems self-evident. The only possible rationale that a wholesaler or other product seller can make is that it does not play a role in the design of a product. Accordingly, sellers are less likely to become involved in testing and quality assurance. There are numerous public policy reasons to reject this limitation of liability on non-manufacturers. For simplicity I have listed them below.

(*a*) Product sellers can and will engage in product research and exercise considerable discretion in carrying only those products which are safe if liability is imposed on them beyond the ancient negligent standard.

(*b*) Product sellers have the ultimate economic power to insist on product quality by manufacturers. Only the seller can cease to carry a product for sale to the public. If the potential for non-manufacturer liability is eliminated, the most central form of pressure that can be brought to bear to increase product quality can be lost.

(*c*) Product sellers have an opportunity to engage in inspection and testing of products. For a fairly nominal cost, product sellers can be involved in evaluating, inspecting and from time to time, testing the quality of the products they sell. If non-manufacturer liability is limited to negligence, the preventive measures mentioned above will not occur.

(*d*) There is nothing onerous about the imposition of strict liability on product sellers. It has been the law for years in numerous jurisdictions. Since the October draft does not disturb principles of contribution and indemnity, product sellers can become involved in the loss sharing process, a role that is perfectly legitimate in view of the fact that sellers are fiscal beneficiaries of the product. Based on state law, they may actually be able to pass on the majority of their responsibility to the manufacturer.

Definitions

The definitions in the October draft raise several difficult problems. A few of these will be mentioned below.

(*a*) "Practical technological feasibility" is defined in such a way that it would require plaintiffs to produce evidence related to the broad scope of an industry. Moreover, the definition uses the term "available and capable of use" as a central refinement. The "practical technological feasibility" phrase is central to the design defect area. By insertion of the term "capable" a plaintiff must show fiscal capacity and present existence. Ideas that are available and easy to implement but not yet implemented would be excluded from this definition.

(*b*) The definition of "manufacturer" involves an element of scienter. It allows for an entity to identify itself as something other than a manufacturer if it does not "hold itself out" as a manufacturer. For example, if a large retailer uses outside industrial producers to make its products, and then labels the product with the label of the industrial producer, it could seek to claim non-manufacturer status.

(*c*) The phrase "reasonably anticipated conduct" is tremendously restrictive. Rather than using the simple negligence notion of foreseeability, the drafters of the October draft chose the words "expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." To think that this phrase will result in state by state judicial harmony is pure folly. While this definition is better than the language in the original S. 44, it will preclude conduct which may be reasonable, but which might not be "expected" or "familiar". In light of the fact that the phrase "reasonably anticipated conduct" is central to liability in the design defect area, its definition becomes a critical component on limiting liability based on plaintiffs' behavior.

(*d*) The "exercise of reasonable prudence" is given a definition which require identification of a broad range of circumstances, including "protection of their own interests and the interests of others." Implicit in this phrase is the idea of contributory negligence and plaintiffs' misconduct. One of the central developments in strict liability law has been to force courts to focus on products, and not the conduct of the defendant or plaintiff. Outside of serious misuse of a product, strict liability law has evolved to the point where the plaintiff's use of a product is far less important than the nature of the product, in order to provide a consistent incentive for product quality improvement. Throughout this bill, reference is made to the plaintiffs' conduct, culminating in Section 9 which revives concepts of contributory negligence which have been deemed contrary to public policy in 36 states. While I do not believe that the plaintiffs' activity is irrelevant, it is given an importance in this product liability formula that is grossly out of proportion with the importance given plaintiffs' conduct in strict liability law at the present time.

Comparative fault

The section on comparative fault begins with the proposition that concepts of comparative fault and not the repressive notion of contributory negligence shall apply in product liability cases brought pursuant to the October draft. The proposition is flawed in two significant ways. First it makes clear that the plaintiffs' conduct is always relevant. Second it raises the repudiated fellow servant doctrine. It appears to be unimportant whether the theory of the law suit involves a deficient mode of production, a design defect, a flagrant failure to warn, or simple negligence.

The plaintiffs' theory of recovery does not dictate the extent to which the plaintiffs' fault is of consequence. This is a retrenchment of considerable consequence.

Many states have moved away from making an assessment of the plaintiffs' responsibility a part of every products liability case. In an effort to focus on product quality, courts have restricted comparative fault contributory negligence and defenses to those cases outside of gross misuse in which a negligence based formula has been proffered. Section 9 renders this development a nullity. Not only is the plaintiffs' conduct relevant, but plaintiff's conduct now must be judged pursuant to Section 9(c) which defines misuse as conduct "not inconsistent with reasonably anticipated conduct of the users," and then defines reasonably anticipated conduct as "expected, ordinary and familiar." As mentioned in the definition section, this concept expands the range of activity beyond "reasonable" and allows an affirmative defense that the plaintiff's activity was somehow not "expected."

Second, the section goes on to note that the plaintiff will be taxed for participation in "unexpected" activity, even if the conduct is the consequence of the failure of another person including another employer to train the plaintiff to use the product, including another employee. This smacks of the fellow servant doctine, an idea so thoroughly repudiated that it has not reared its ugly head for decades.

It takes no great insight to realize the desired goal of Section 9 The purpose of this section is to allow manufacturers to avoid liability for the production of defective products based on the activities of plaintiffs, even if the plaintiffs' activity is in some sense reasonable. It is not hard to see how this will allow for arguments relating to the revival of complex assumption of risk defenses and similar devices repudiated in a number of states designed to avoid liability which have been. This will certainly not produce "uniformity."

Other portions of the comparative fault sections of this bill raise similar interpretive problems. While at the outset of the section contributory negligence is rejected, in the final sections (g) and (h) the concept of contributory negligence reappears. It would not be inconceivable for it to be perceived as a complete bar in some circumstances. While negligence in handling defective product does not bar liability in states where 402A is applied, the October draft would change all that.

A final concern with the comparative fault section is the fixation with the concept of individual causation. The section is inconsistent in its approach on joint and several liability. At one point it appears to require that a plaintiff prove individual fault in every instance for every defendant. In another section it appears to allow for joint and several responsibility. It is not clear whether a defendant's liability is measured only to the extent of its contribution to a particular harm in a situation with multiple defendants. Rather than speculating on the meaning of this, suffice it to say that the section is ambiguous.

Warnings

In modifying the standard of liability for failure to warn, the Staff Draft departs from the traditional 402A approach and erects a convoluted and inappropriate negligence standard. For example, the manufacturer's "reasonably prudent person" standard is weakened by caveats of likelihood and seriousness of harm. Additionally, the user's conduct must be "reasonably anticipated" in order for a manufacturer to be held liable. Defined as "expected, ordinary and familiar of the class of persons likely to use or be exposed to the product," the new standard distorts the traditional focus on foreseeable use.

The central problem with the warning provision is that it eliminates any presumptive obligation to warn. It creates a negligence assessment at odds with 402(a) warning cases. While there are many approaches to the problem, this is most assuredly the one least designed to provide comprehensive consumer protection. *Barker* v. *Lull Engineering Co., Inc.*, 20 Cal.3d 413 (1978); *Caterpillar Tractor Co.* v. *Beck*, 593 P.2d 871 (Sup. Ct. Alaska, 1979).

CONCLUSION

The October Draft of S. 44 will not achieve the purposes of its authors. It will not achieve uniformity because of the uniqueness and complexity of the language. It will not provide efficient and fair systems of personal injury litigation. Instead, it will interfere with the implementation of state law in a crude and intrusive manner. It will create new standards for the role of the jury, punitive damages and design defect cases. It will destroy clear and long standing entitlements in a number of states in the product liability area. In no area will it provide substantially greater protection for those most in need, the injured plaintiff. Accordingly, I oppose committee approval of the October Draft.

Senator KASTEN. Thank you, Mr. Popper.

The next witness is Mr. James Clark, a partner in London, Yancy, Clark, and Allen, Birmingham, Ala.

Mr. Clark.

Mr. CLARK. I am Red Clark, and I am unique in that I am the only person here who has opposed Senator Heflin in the courtroom, and that is a job. I am here to reason with him. I think perhaps also I was only invited this past Monday, and I have not prepared myself on all of the aspects of this bill as many of these other people have. However, I have tried to look into the punitive damage aspect, because Alabama is unique, and there are some concerns about that that I can understand Senator Heflin is making.

But in the overall, I must express this philosophical view. I am not that old, but I understand about 1920 the States started enacting workmen's compensation acts, and that was because the employers' liability acts which preceded it were not working.

Now, I believe in that thing about "if it ain't broke, don't fix it," but I do not think the present system of products liability reparation is working. There is great disparity in results. There are great injustices.

One of the things that is very difficult about it, as the various courts' interpretations of the long-arm statutes become more and more liberal, this certainly poses a problem which favors some uniformity.

We get a large number—I would say 60 percent of our law practice now is defending products liability suits, and of that 60 percent, 80 percent or more, involve products sent into Alabama from other States, and where the manufacturers—they do not know what the requirements are in the State of Alabama. They do not know what the requirements are in Tennessee, and so forth. That, to me, is a good argument for some uniformity. Give us something that is the same to all to work with.

It would seem to me that the main thrust of the bill is fair. I do not purport to be a student of the law or a scholar. I write pretty good briefs sometimes. But I do not see that it really offends the basic common law principles, the principles of law that have existed for years.

All of which boils down to what I call the reasonable man test. Throughout this bill, it allows the tryer of the facts to follow a reasonable man test in determining whether or not there should be liability. We say we do not have strict liability in Alabama. We have the Alabama extended manufacturers' liability where they give us back the assumption of risk and the contributory negligence, but it is strict liability.

We can deal with it, but the variations of the rules from State to State, they are very disturbing. It really is a tug of war between the plaintiff's bar and the defendant's bar.

My senior partner, Mr. Yancy, goes down to the legislature every now and then, and we argue about these things, and he always has one statement to bring across the table. And I might say that the philosophy of my law firm is, love me, sue my client; so I am not mad at the plaintiff's lawyers, but they are going to kill the goose that is laying the golden egg with these terrible shock verdicts,

runaway verdicts that we have, particularly in the product liability field.

Also, as you might suspect, we do quite a bit of work for the insurance companies. Products liability insurance is the only form of insurance I know that is not rated from the standpoint of risk as to what premium to charge for it on a State-to-State basis, and this is because the product goes everywhere.

Senator KASTEN. Mr. Clark, you may summarize your statement.

Mr. CLARK. Well, I have not spoken on punitive damages. There are problems in it in that in Alabama a wrongful death action, you can only recover punitive damages. You cannot recover compensatory damages. I believe, though, there have been some suggestions made that could correct that and give to the plaintiff's bar in Alabama compensatory damages as well as punitive damages.

In summary, I am for it. I think it is a good effort to do something that is what I would call remedial legislation. And the very fact that there have been some changes which I see are improvements, I think you might as well face it; ultimately, the public is going to have a view like this.

[The statement follows:]

STATEMENT OF JAMES E. CLARK

Mr. Chairman and members of the Committee, I am "Red" Clark, an attorney in private practice with a law firm in Birmingham, Alabama. I have been litigating product liability tort cases for 35 years. In the past decade or more, there has been such an explosion in the field of product liability litigation that, along with the defense of professional malpractice cases, it constitutes the major part of my firm's practice. Based on my experience and knowledge of the law of product liability, I believe there are real problems with the way punitive damages are assessed. The consequences thereof may well be more detrimental than we realize to all of us, consumers and manufacturers alike. The problems of punitive damages in product liability cases, however, can be resolved through Federal legislation, such as S. 44.

The "More Adequate Award" in produce liability cases against nationally known manufacturers may now run into millions of dollars because of the addition of punitive damages over and above compensatory damages, thereby imposing a financial burden which could bend, if not break, many of the companies. Many of the smaller companies which may not be able to afford the prohibitive expense of product liability insurance in sufficient limits may be put out of business. In several States, insurance to cover liability against wrongful conduct resulting in punitive damages cannot be procured on account of public policy. It, thus, can be seen that manufacturers are on the horns of a dilemma which can only be partially solved by passing the cost of payment of runaway judgments on to the purchasers of their product; wherefore, the buying public pays an increased price, for there is no such thing as a free lunch. Plaintiffs lawyers in products cases are becoming millionaires and Defense attorneys are making a good living from the great volume of suits which clog the Courts and made this so-called administration of justice so expensive from a taxpayer's standpoint. These are some of the side effects of leaving the recovery of punitive damages unbridled in product liability cases.

Before discussing the problems of punitive damages, it is appropriate to focus on the purpose they serve. The law imposes punitive damages on a defendant whose willful or wanton acts in reckless disregard for the safety of others result in harm. Such conduct should be punished and the punishment should serve to deter others from engaging in reckless conduct of a similar nature but, whether it does or not, and if so, to what extent, is an open question. In a civil case, the punishment is monetary, analogous to a fine. This kind of penalty is known as punitive damages. In Court, we sometimes call it "Smart Money", sought for revenge.

Punitive damages in most States are separate and distinct from compensatory damages, also known as pecuniary damages. They serve different purposes—one pays an injured claimant his or her medical expenses, lost income or profit, lost enjoyment of life, and pain and suffering; the other punishes a party's reckless conduct. A manufacturer is liable for pecuniary damages upon proof that a claimant

was injured by a defective product. Proof of a different character is needed to establish reckless or wanton conduct and the manufacturer's liability for punitive damages. Evidence relevant to the appropriate amount of compensatory damages varies with each injured claimant. The focus is, essentially: "How much is enough to compensate this claimant for his harm?" The appropriate amount of punitive damages, on the other hand, focuses on: "How much is enough to punish this defendant for this conduct?" This brings on many considerations.

The problems associated with the assessment of punitive damages in product liability cases are manifold. Most important, there is the problem that punitive damages may be assessed in every case involving a defective product. With mass production, hundreds of products made to the same design reach consumers. If the design is defective, each consumer is harmed by the defect and is entitled to compensatory damages. If the manufacturer acted with reckless indifference to consequences in choosing the design, it should be punished. But, should punitive damages be litigated and assessed in every case? I submit that this result, entirely possible under today's law, is unfair and costly.

It is unfair, because it amounts to repeated punishment for the single act of choosing a particular design. There is no other area of law that would countenance multiple punishment for a single act. Indeed, the Fifth Amendment of the United States Constitution guarantees that no person shall be twice put in jeopardy for the same offense. Punitive damages in product liability cases are analogous to a criminal fine or sentence and, therefore, product manufacturers, like criminal defendants, should be protected against repeated punishment. Repeated punishment serves no purpose. Once a manufacturer has been fined an appropriate amount for its reckless acts, additional punishment does nothing to advance the goal of punishment and deterrence. The punitive damages awarded merely line the pocketbooks of the Plaintiffs and their lawyers. Finally, repeated punishment is unfair to consumers who ultimately pay the cost of litigating the issue over and over and the cost of the fines themselves.

Under present product liability law and practice, there are problems associated with finding that a manufacturer has engaged in reckless conduct and with determining the appropriate amount of punishment. Too often I have seen juries confuse evidence that relates solely to the amount of punishment with the issue of reckless conduct. When evidence of a manufacturer's wealth and assets is admitted at trial for purposes of determining the amount of punitive damages, as in many States, juries are improperly persuaded that the manufacturer is "guilty" of reckless conduct and are apt to become very liberal with someone else's money. Although unintended, the result may be that punitive damages are assessed erroneously.

In criminal cases, the risk of an erroneous finding of guilty is minimized by procedures that keep the issue of guilt separate from the issue of appropriate sentence and by having the Judge, rather than the jury, impose the sentence. Further, the risk of error with regard to guilt is minimized by requiring proof of guilt beyond a reasonable doubt. Because punitive damages in product liability cases are analogous to criminal sanctions, similar safeguards against error should be provided.

Finally, I think it is inappropriate that a single claimant, who has already been adequately awarded his or her actual damages through the award of compensatory damages, should receive additional money in the form of punitive damages, i.e., "blood money". The law imposes punitive damages because our society wants to punish and deter reckless conduct. Society in general, rather than a single claimant, should benefit by the fine imposed on reckless conduct.

Section 12 of S. 44 addresses each of these problems of punitive damages. It does so in a fair and workable manner. It requires proof of reckless conduct by clear and convincing evidence, a higher standard of proof than that required to recover compensatory damages and one that will minimize the risk of erroneous punishment. It requires the jury to find reckless disregard and liability for punitive damages, but leaves the issue of the amount of punishment to the Court. By separating the issues, Section 12 ensures that irrelevant evidence, such as the wealth of the manufacturer, will not be presented to or influence the jury on the issue of liability for punitive damages. It is more likely that a Judge, being learned in the law, will hold the award of punitive damages within reasonable limits and not be seduced by the passion and prejudice which may be engendered in a lay jury.

Section 12 specifies that a manufacturer shall be punished only once for a single course of conduct manifesting reckless disregard for safety. This is fair and will reduce the costs of repeatedly litigating the issue. Section 12 also sets forth guidelines to ensure that the amount of the single punitive damage award set by the Court sufficiently punishes the manufacturer. Finally, the assessment of punitive damages will be distributed to a public purpose so that society benefits from the

punishment it imposes on wanton conduct. The Court may, in its discretion, distribute a portion of the assessment to the claimant. This caveat provides the incentive to pursue punitive damages.

I commend Senator Kasten, Senator Trible and Senator Gorton for their diligence in developing a workable solution to the problems of punitive damages in product liability litigation. These problems can be controlled and for the public good with "exact and equal justice to every man, of whatever state or persuasion" as in the words of Thomas Jefferson.

I will, if possible within the short time which must necessarily be allocated for my testimony and in the period of questioning which may follow, be pleased to express my views on: (1) The need for this legislation; (2) The fact that, by and large, it does not do violence to legal principles well established in respect to the character, quantum and quality of plaintiff's burden of proof in a product liability case; (3) The morality and wholesomeness of S. 44 from the standpoint of Public Policy and (4) the Act does not constitute any undue invasion of States Rights. In this latter connection, I recognize that the punitive damage section of the Bill, as presently drafted, creates a curable conflict with Alabama's unique rule relating to damages recoverable in Wrongful Death Cases.

Senator KASTEN. Thank you, Mr. Clark.

The next witness is Prof. Dorsey Ellis of the University of Iowa.

Mr. ELLIS. Thank you, Senator, for the opportunity to appear here today. I have submitted a statement, and I will summarize it here.

I spent a good part of my professional life over the last 4 years or so studying the law of punitive damages, and I confine my remarks here this morning to section 12 dealing with punitive damages.

Almost all courts and commentators agree that the purposes of punitive damages are to punish and deter. Those are public purposes. They are the same purposes that underlie our criminal law. We do not, for reasons of fairness, allow common law crimes. We do not, for reasons of fairness, allow the application of ex post facto law in the law of crimes. Yet, the law of punitive damages is common law. It is ex post facto law. It is a law that varies widely from State to State. It is characterized by terminology that is unacceptedly vague and does not provide notice to those whom it purports to govern as to what conduct is proscribed.

Punitive damage law, therefore, is not only unfair; it provides ineffective deterrence. It is especially bad in the products liability area. This is the result of marrying two incompatible bodies of law—the doctrine of punitive damages, which arose in the context of interpersonal intentional torts, and the law of products liability that arose to deal with the problem of defective products.

Almost every punitive damage case involving products liability is a design defect case The result is that the manufacturer is placed between the proverbial rock and the hard place. Design defect law, even in California, requires and anticipates that the manufacturer will balance the interest of safety against the utility of the product—utility including such things as cost, performance, fuel efficiency, and so forth. Yet, the manufacturer who does so and who is subsequently found by the jury to have made a negligent or incorrect balance, may be held liable for punitive damages, not for making the incorrect balance, but for having actually been aware that there were safety problems associated with the product, and failing to manufacture it in such a way as to avoid those problems completely. That is, the manufacturer is held liable for punitive damages because the manufacturer undertook the very balancing

that the cases, like Barker against Lull Engineering in California, required it to do in the design defect area.

Moreover, under our present punitive damage law, the manufacturer is punished over and over and over again. This, of course, flies very much in the face of the principles of double jeopardy.

Section 12 of this bill goes a long way toward remedying some of those problems. It first tightens the definition and provides a uniform definition of the conduct that will subject the manufacturer to liability for punitive damages, and it does so in a way that is reasonably comprehensible, far more so than the variety and vagaries that characterize State law today.

Second, it provides for a bifurcated trial so that evidence that is relevant only to the question whether the manufacturer should be punished, but irrelevant to the question whether the manufacturer should be liable for compensatory damages, will not be introduced in the trial on liability for compensatory damage and thereby potentially prejudice the outcome of that case.

It also provides a clear and convincing evidence standard. We would not subject any criminal defendant to criminal sanctions without proof beyond a reasonable doubt. Yet, under current punitive damage law, a mere preponderance of the evidence will suffice. The clear and convincing evidence standard is a reasonable compromise between the two.

The bill requires the judge to determine the amount of the punitive damages once the jury determines that the manufacturer ought to be assessed. That again parallels the situation in the criminal law.

Perhaps the most controversial part of this bill is that it limits the assessment of punitive damages to a single instance; that is, it avoids the double jeopardy problem that pervades the punitive damages area now.

It is not that subsequent plaintiffs are persona non grata. Every subsequent plaintiff is entitled to recover for compensatory damages. Moreover, the first product liability case is not necessarily the first case in which punitive damages will be assessed. In order to have punitive damages assessed, the plaintiff must show with clear and convincing evidence that the manufacturer has acted in reckless disregard of safety. And both the plaintiff's lawyer and the court will be aware that the assessment of punitive damage can occur only once.

I share with Professor Popper some of the reservations about the mechanics for the distribution of the portion of the assessment that does not go to the plaintiff, but in other respects, I support section 12 of this bill.

[The statement follows:]

STATEMENT OF DORSEY D. ELLIS, JR., PROFESSOR OF LAW, UNIVERSITY OF IOWA

I appreciate your kind invitation to testify on the punitive damage provisions of S. 44.[1] In the past decade, the number of products liability cases in which punitive damages are assessed and the size of the awards have increased dramatically. Claims for punitive damages have essentially become boiler-plate provisions in prod-

[1] In the preparation of this paper, I have benefited from the research assistance of Michael Zeka and Joanne MacKusick and from a seminar paper written by John Telleen, all of whom are students at the University of Iowa College of Law.

ucts liability complaints. This has led to the re-examination of the purpose and effects of punitive damages by a number of legal scholars. Although other rationalizations have from time to time been offered for punitive damages, almost all courts and commentators agree that their primary purposes are punishment and deterrence.[2]

Punishment is based on a notion of retribution. It reflects a desire to impose a detriment on someone because they did something wrong. In a free and civilized society, punishment requires fair notice of what society believes deserves to be punished. It also requires a fair procedure for determining whether one should be punished and if so to what extent. It requires that an offender be punished only once for a single offense. Finally it requires that punishment be proportional to the wrong done; punishment should not be excessive. These familiar principles are embodied in our Bill of Rights.

Deterrence is a means of regulating future conduct. It functions by imposing a detriment on someone in order to discourage that person and others from repeating conduct that causes harm to society. Obviously, deterrence is appropriate only where society would be better off if the conduct were not engaged in. To be effective, deterrence requires that the discouraged conduct be clearly identified so that the person on whom the determent is being imposed and others will be put on notice what conduct is being condemned. In addition, effective deterrence requires that socially desirable conduct not be discouraged. Of course, society is no better off from the imposition of a determent if the burdens of imposing it exceed the benefits to society.

When the present law of punitive damages is scrutinized against the foregoing criteria, especially as that law is applied in the products liability area, it does not measure up at all.

First, the criteria that the courts use for assessing punitive damages are characterized by vagueness and uncertainty to an intolerable degree. Punitive damages have been upheld where the defendant's conduct is characterized as having been done with "malice"—a term that has been expanded far beyond its original meaning of hatred, ill will, or spite– with "reckless disregard" or "conscious disregard" of the interests of others, or "wilful or wanton" conduct, or even if characterized as "gross negligence"—an "unhappy term of ill-defined content." When courts undertake to provide some specificity to such terms, the results are further inconsistency and confusion. Moreover, the use and definition of those terms vary from state to state.

The use of such vague and inconsistent criteria not only fails to give fair notice to people of what conduct will subject them to punishment, it also renders deterrence ineffective. Moreover, the persons who are intended to be deterred are not provided sufficient identification of the type of conduct sought to be discouraged. Hence, it is to be expected that conduct society desires to discourage is not being deterred while socially desirable conduct is deterred.

The variety and vagueness of the terms used to characterize the criteria for punitive damages would create confusion and uncertainty even if judges alone used them. But under the present system the initial and most important decision is usually made by a jury, an ad hoc body of law persons whose knowledge of legal standards is limited to the instructions they receive from the court. Jury instructions on the standards for punitive damage assessments are singularly unilluminating. Typically, no effort is made to define for the jury the meaning of the terms used to describe the criteria for punitive damages. Thus, the jury is required to do two things: determine on an ad hoc basis the content of the standard to be applied to the defendant's conduct; and decide whether the conduct at issue falls within that standard. In the emotionally-charged context of a civil trial that lacks the safeguards of a criminal proceeding, in which the jury is invited to assess punitive damages with little guidance and less constraint, their decisions will be affected, as the Supreme Court has pointed out,[3] by the jury's latest biases or redistributional inclinations.

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[2] See, e.g., Ellis, Efficiency and Vicarious Liability for Punitive Damages, Supreme Ct. Econ. Rev. Vol. 1, 135, 139 (1982); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 11 (1982); Ellis, Punitive Damages in Iowa Law: A Critical Assessment, 66 Ia. L. Rev. 1005, 1008 (1981); Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133 (1982); Wheeler, The Constitutional Case for Reforming Punitive Damage Procedures, 69 Va. L. Rev. 269, 310 (1983); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1981); Restatement (Second) of the Law of Torts § 980(1) (1979). The first section of this statement is based upon Ellis, Fairness and Efficiency, supra.

[3] "[Since] juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively

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Introduction of evidence of the defendant's wealth, allowed in punitive damage cases, will exacerbate any inclination a jury has to redistribute wealth.

The foregoing problems are especially acute in products liability cases. As the law regarding design defects has evolved, most courts have been compelled to acknowledge that trade-offs must be made between increased safety and other desirable features (lower cost, energy consumption, better performance, etc.). Even California has recognized the necessity of such a cost-benefit or risk-benefit analysis.[4] To responsibly carry out such an analysis, the manufacturer may have to assess the relative safety of alternative designs. That implies knowledge of dangers associated with the product. Of course, the jury is entitled to make its own judgment about the appropriate balance between risk and benefit, and to find the product defective if the one chosen by the manufacturer gave less weight to the risk than the jury believes proper. However, decisions in cases such as *Grimshaw* [5] and *Dorsey* v. *Honda Motor Co.*,[6] not only hold the manufacturers liable for striking the wrong balance between risk and benefit, but assess punitive damages against them for undertaking the very balancing that *Barker* anticipates and requires. It is little wonder, then, that almost all the products liability cases in which punitive damages have been assessed involve design defects.

The two versions of S. 44, to which I shall subsequently refer as the "original version" and the "working draft," respectively, address a number of the shortcomings of present punitive damage law. Initially, by superseding state law (§ 3(c)(1)), S. 44 would establish uniform substantive standards, evidentiary standards, and assessment procedures. A national manufacturer of products would thereby be assured that its conduct would be judged by a single standard in determining whether it merited an assessment of punitive damages, rather than by the vagaries of state common and statute law. Of course, since the proposed statute would be construed by the courts of the fifty states and of the federal system (under its diversity jurisdiction) complete uniformity in interpretation could never be achieved. Moreover, uniformity would have expansive as well as limiting effects. That is, S. 44 would not only limit the extent to which states may allow the recovery of punitive damages in products liability cases; it would also require states to allow recovery for punitive damages according to the terms of the act. That would have an immediate effect on the states that now prohibit the recovery of punitive damages,[7] as well as those states whose law is more restrictive on the award of punitive damages than is the statute.[8]

Both versions substantially reduce the vagueness of the standards for determining punitive damage liability. In both versions, punitive damages may be awarded only where "the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users, consumers, or persons who might be harmed by the product." (§ 12(a)(1)). Reckless disregard is defined as "conduct . . . manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice." (§ 12(a)(2)/§ 12(j)).[9] In addition, the working draft expressly provides that "a negligent choice among alternative product designs or warnings, when made in the ordinary course of business, does not by itself constitute 'reckless disregard'." (§ 12(j)). It therefore admonishes the factfinder that a manufacturer who undertakes the risk-benefit analysis required by cases such as *Barker*,[10] consciously weighing the safety of users against the utility of the product design, is not acting "in reckless disregard," even though the weighing is found by the trier of fact to have been negligent. Both versions of the bill, therefore, eliminate the confusing use and inconsistent definition of terms such as "malice," "gross negligence," and "will-

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to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger. . . ." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

[4] *Barker* v. *Lull Eng'r Co.*, 20 cal. 3d 413 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

[5] *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

[6] 655 F.2d 650 (5th Cir. 1981).

[7] Louisiana, Massachusetts, Nebraska, and Washington.

[8] Connecticut (punitive damages in products liability cases limited to twice the amount of compensatory damages); Colorado (punitive damage claims must be proved beyond a reasonable doubt); Michigan (exemplary damages based on intangible harm); New Hampshire (accord).

[9] Where section designations differ between the two versions of the bill, the reference preceding the slash ("/") indicates the section of the original version; the reference following the slash indicates the working draft.

[10] Section 5(b)(2)(A) of the working draft clearly adopts the *Barker* test to determine whether a product was unnecessarily dangerous. Section 5(c) of the original draft is less explicit regarding the use of risk/benefit analysis.

ful or wanton conduct." Moreover, by defining reckless disregard to require both "conscious, flagrant disregard" of safety and "an extreme departure from accepted practice," both versions would limit recovery of punitive damages to those cases in which the manufacturer has knowingly engaged in truly egregious conduct that falls substantially below prevailing standards. "Accepted practices," while it may not always be an appropriate basis for determining liability for compensatory damages—for the familiar reason that an entire industry may be behind society's norms—will ordinarly be the correct standard for judging whether a defendant merits punitive damages. It not only avoids the capricious results of singling-out one manufacturer for punishment for the short-comings of an entire industry; it also provides the fact finder with a relatively objective criterion for judging a manufacturer's conduct; and it puts manufacturers on notice as to the type of conduct that may merit punitive damages. The danger with the "accepted practice" standard is that it will impede socially-beneficial innovations that are, by definition, "departures from accepted practice." And, the more novel the innovation, the more "extreme" the departure.

Of course, the trier of fact still faces the difficult task of applying those principles to the facts of specific cases. Because jurors are necessarily called upon to make normative judgments in such situations and may be influenced by other factors, such as a lack of understanding of cost benefits analyses, a distrust of corporations, a distaste for some publications, or a reluctance to accept that tradeoffs inevitably are made between increased safety and other benefits, the instructions may not be adhered to in the jury room. However, a further benefit of the specific criteria contained in the bill is that a reviewing court, whether the trial judge or an appellate court, would have standards against which to evaluate the jury's decision, in contrast to the present practice of leaving the decision whether to assess punitive damages to the discretion of the jury.

Further guidance to the factfinder, and correspondingly to the reviewing court, is provided in both versions by the listing of factors to be taken into account by the trier of fact. Those factors include the manufacturer's awareness of the likelihood that "serious harm would arise" from the product (§ 12(b)(1)), the conduct of the manufacturer upon discovering that the product caused the harm (§ 12(b)(2)), the duration of the manufacturer's conduct, and "any concealment" of the conduct by the manufacturer (§ 12(b)(3)). The first two factors, awareness and conduct upon discovery, appear on their face to be relevant to the question whether the manufacturer acted in "conscious, flagrant disregard" of safety. They are especially relevant to failure to warn cases. However, in design defect cases, especially in the absence of an admonition that deliberately weighing risk versus utility does not alone constitute reckless disregard, those factors may invite the factfinder to assess punitive damages based upon the manufacturer's undertaking the type of analysis required by *Barker* and similar cases.[11] That is also true with regard to the duration of the conduct. Thus, if the manufacturer continued to manufacture a product following a *Barker*-type analysis, which is subsequently found to have been incorrectly (negligently) carried out, the duration of the manufacturer's conduct seems irrelevant. The fact of concealment, of course, can be taken to imply consciousness of guilt, a common, although not necessarily justifiable, basis for condemning actions. But, in the industrial sphere, concealment of activity may well be motivated, not by any implicit admission of wrongdoing, but by a desire to protect trade secrets.

The original version of the bill also requires the trier of fact to consider "whether the harm suffered by the claimant was partly the result of the claimant's own negligent conduct." (§ 12(b)(4)). That provision implies that principles of comparative fault are carried forward to the punitive damages issue. Thus, the original version goes beyond the M.U. P.L.A., which made the "claimant's own reckless disregard for personal safety" an element to be considered in assessing punitive damages.[12] While the claimant's negligence or recklessness may well be relevant to questions of moral responsibility, cost-internalization and causation, and therefore appropriately considered in assessing compensatory damages, it is not relevant to the decision whether to assess punitive damages. To be sure, where the punitive damages are to be awarded to the claimant, doing so may be inappropriate if the claimant is not free of fault. But that would suggest that the claimant's fault should be considered, not on the question whether the manufacturer should be assessed punitive damages, but on the magnitude of any punitive damage assessment that is awarded to the claimant. Hence, if that factor were to be considered at all, it would seem more appropriately done by the court in determining the amount of any punitive damage

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[11] See, e.g., *Grimshaw* and *Honda*, supra notes 5, 6.
[12] Model Uniform Product Liability Act § 120(A).

award that may be made to the claimant. (§ 12(b)(4)). The working draft avoids the problem by omitting any reference to the claimant's conduct.

Both drafts provide further guidance to the factfinder in determining whether the manufacturer's conduct deserves an assessment of punitive damages by explicity allowing the introduction of "relvant evidence of post-manufacturing improvements in defense of punitive damages." (§ 12(d)). By implication, Section 12(d) appears to require that the jury be affirmatively instructed that evidence of post-manufacturing improvements offered by the manufacturer be considered in determining whether an assessment of punitive damages is called for. The relevance of such evidence to the egregiousness of the manufacturer's conduct has been acknowledged by some judicial decisions,[13] an approach that would be codified by the bill. Post-manufacturing improvements clearly appear to be relevant to the state of mind of the manufacturer's agents. The explicit inclusion of this provision is made necessary by the provisions of § 13 that would exclude such evidence on the question of liability for compensatory damages. (§ 13(a)).

Both versions adopt a "clear and convincing" evidentiary standard for the determination that the harm to the claimant resulted from the manufacturer's reckless disregard. Because the issue to be resolved in deciding whether punitive damages should be assessed is whether the defendant deserves to be punished, as opposed to whether the defendant ought to compensate the plaintiff for the plaintiff's injury, it is appropriate that the evidentiary standard be more then a mere preponderance of evidence. Where the question is only liability for compensatory damages, there is symmetry between the plaintiff and defendant in that an error in favor of one party undeservedly imposes a detriment on the other. As the Supreme Court has observed, the litigants in that situation should "share the risk of error in roughly equal fashion."[14] An error in defendant's favor on the issue of punitive damages, however, does not deprive deserving plaintiffs of compensation for their loss, but an error against the defendant results in unjust punishment.

Assuming a higher evidentiary standard is appropriate in punitive damages cases, the question remains whether it should be the "reasonable doubt" standard used in the criminal law.[15] Because the defendant's life and liberty are not in jeopardy in a punitive damages case, but only its wealth, perhaps the clear and convincing standard provides adequate protection against erroneous punishment.[16]

Both versions would require that the court determine the amount of punitive damages to be assessed, after the factfinder has determined whether the manufacturer's conduct is deserving of any punitive damages assessment. (§ 12(c)). However, the working draft also requires a bifurcated trial on the question of liability. (§ 12(a)(1)). Only after a verdict has been entered against the defendant for compensatory damages is the issue of any punitive damage liability assessed. Hence, evidence that is relevant only to the punitive damages question, such as the factors enumerated in § 12(b) and the evidence of post-manufacturing improvements offered by the manufacturer, would not be admissible in the trial on liability. A bifurcated trial would thus avoid the potentially prejudicial effect of such evidence on the jury's determination of liability and compensatory damages. In that regard, therefore, the working draft improves on the original version.

Placing the decision as to the amount of any punitive damage assessment on the judge rather than on the jury is consistent with the pattern typically followed in criminal cases, and is a reform that has been advocated by a number of scholars. The judge, who typically possesses far wider experience, with accident cases in general and products cases in particular, than the jury can ever have, has a superior perspective from which to determine the appropriate size of any assessment. Under the present state of the law, jurors are given only the vaguest guidelines for determining the size of an appropriate assessment, and awards for stupendous amounts have been rendered by juries, only to be remitted by the court, either the trial judge or an appellate court. One study found that out of 45 reported punitive damage cases decided by the New York appellate courts over a ten year period, in 35 the punitive damages were remitted or the award was reversed.[17] Another study found

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[13] See, e.g., Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 1198 (4th Cir. 1982).

[14] Wheeler, supra note 2, at 292; Santosky v. Kramer, 102 S. Ct. 1388 (1982).

[15] Colorado has adopted the reasonable doubt standard in assessing exemplary damages. Colo. Rev. Stat. § 13-25-127(2) (1973).

[16] Minnesota, Oregon and Wisconsin, have adopted the clear and convincing standard; Minn. Stat. Ann. § 549.20(4) (1978); Ore. Rev. Stat. § 30.925(1) (1979); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980). See also Judge Friendly's opinion in Roginsky v. Richardson Merrell, Inc., 378 F.2d 832 (2d Cir. 1967).

[17] Wheeler, supra note 2, at 288.

that trial judges in California, while strongly supportive of the jury in the performance of its ordinary civil functions, tended to doubt the correctness of their determination of punitive damages.[18] The determination of the magnitude of an appropriate punitive damage assessment by the judge has the further advantage that, as in criminal cases, evidence of relevant factors such as the financial condition of the defendant, the extent of other punishment imposed for the same conduct, the size of assessments made against others in comparable situations, and the general character and conduct of the defendant can all be taken into account, without prejudicing the trial on liability.

The propriety of the court taking into account many of these factors is made explicit by S. 44. (§ 12(c)). In both versions, the court must take into account all of the factors listed in § 12(b) that are appropriate to the issue of whether any punitive damage assessment should be made. In addition, the court must take into account the "profitability of the conduct to the manufacturer." (§ 12(c)(2)). That factor is clearly relevant to the size of any punitive damage assessment in that the profitability of the offending conduct is the measure of the damage award necessary to provide effective deterrence. It serves the same function as, and is more appropriate than, the evidence of wealth criterion used in most states. The profitability of the particular conduct, rather than the overall wealth of the defendant provides the incentive to the manufacturer to engage in it, and it is that conduct that is sought to be deterred. If the conduct resulted in an increase, say of $100,000, in the manufacturer's profits, it does not matter for deterrence purposes whether the bottom line of the corporation shows a $100,000, a $1,000,000, or a $100,000,000 overall profit, or none at all. What is needed to provide effective deterrence is a sanction on the manufacturer sufficient to provide a disincentive to engage in conduct that would add $100,000 to its profits.

That is not to say, however, that this provision is without problems. Determining the profitability of a particular course of conduct is a most uncertain undertaking. Merely to show that the manufacturer saved x-dollars in costs by the conduct in question does not demonstrate that the manufacturer increased its profits by that amount. If the savings in cost resulted in a reduction in the price charged to the user, the increase in profits to the manufacturer may have been more or less than the cost savings. Economically feasible accounting methods are far too crude to allow the determination of profitability at so refined a level. The profitability criterion, therefore, must be used with great discretion.

Both versions also quite properly admonish the court to take into account other sanctions that have been or are likely to be imposed against the manufacturer for the same conduct. (§ 12(c)(3)/§ 12(c)(7)). Since the purpose of punitive damages is to punish and deter conduct of the manufacturer that is in reckless disregard of the safety of others, it is the totality of sanctions that must be assessed in determining the appropriate level of any punitive damages. Under the original version, the court could determine that, in light of punitive damage assessments already imposed on the manufacturer in other cases, the assessment of any further punitive damages would result in excessive sanctions. (Under the working draft, that question would presumably not arise since punitive damages can be assessed only once. § 12(g)).

A related factor contained in the working draft is "all resolved and pending claims against the manufacturer." (§ 12(c)(3)). This factor should be taken into account, not only because a punitive damage assessment when coupled with compensatory damages that have been or may be assessed against the manufacturer may put it out of business, but also because compensatory damages themselves serve a deterrent function. The aggregate of compensatory damages for which the manufacturer is liable may well provide quite adequate deterrence, obviating the necessity of any punitive damage assessment.[19]

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[18] Schwartz, supra note 1, at 149. California trial judges were asked the following questions:

Question III-B-1-1. Do you regard the jury's pain-and-suffering calculations as: (*a*) Almost always sensible, 8.4 percent; (*b*) generally sensible, 63.2 percent; (*c*) sometimes sensible, sometimes not, 24.3 percent; (*d*) generally not sensible, 4.2 percent; and (*e*) almost always not sensible, 0 percent.

Question III-B-2-2. Do you regard the jury's assessment of the amount of punitive damages as: (*a*) Almost always sensible, 3.2 percent; (*b*) generally sensible, 35.2 percent; (*c*) sometimes sensible, sometimes not, 45.4 percent; (*d*) generally not sensible, 15.7 percent; and (*e*) almost always not sensible, 0.5 percent.

[19] The English courts have expressly recognized this fact:

"In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate

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The working draft adds three other factors to be considered by the court in determining the size of any punitive damage assessment: the "quality of the conduct" of the manufacturer (§ 12(c)(4)), the "total resources and the condition of the business of the manufacturer" (§ 12(c)(5)), and "the nature of the harm" caused by the conduct (§ 12(c)(6)). Presumably, the "quality of the conduct" refers to the egregiousness of the manufacturer's departure from the norm, although the language chosen is rather opaque. The same can be said for the "nature of the harm," which presumably refers to the type and gravity of the harm that has or can be expected to result from the manufacturer's conduct. Both of those factors are, of course, relevant to the size of any sanction visited upon the defendant. The question of the defendant's "resources and . . . condition of business" presumably goes to the issue whether the imposition of a punitive damage assessment will merely "sting, not kill" the defendant. If the combination of damage awards results in the manufacturer going out of business, the effect will be visited not merely upon the stockholders, but upon its employees, customers, suppliers, and creditors, as well as other potential claimants.

The working draft provides two other significant changes in existing law. First, it provides that the court may distribute a portion of the punitive damage assessment that it deems appropriate to the plaintiff, not to exceed an amount equal to the compensatory damages. The remainder is to be used for "a public purpose designated by the court." (§ 12(f)(1)). This provision overcomes the objection that many have addressed to punitive damage law, that although the punitive damage assessment is made for a public purpose, to punish and deter, the plaintiff who receives the damages is the beneficiary of a windfall. Of course, that problem could be avoided by simply requiring that punitive damages be distributed to the public in some fashion. However, such an approach encounters the objection that plaintiffs would then have no incentive to serve as "private attorneys general" in seeking to have punitive damages imposed on reckless manufacturers. The working draft, by providing that the plaintiff may receive a portion of the punitive damage assessment up to an amount equaling compensatory damages strikes a reasonable balance. The plaintiff could, in effect, receive double damages. That would appear to be sufficient incentive to encourage plaintiffs to act as private attorneys general. But the plaintiff would not receive a windfall.

There are, however, two troublesome aspects of the approach taken by the working draft in its present form. First, there are no criteria provided for the court to determine what portion of the punitive damages is "appropriate" to award to plaintiff, other than imposing compensatory damages as a ceiling. The bill appears to leave that determination entirely within the court's discretion, without any guiding principles. This contrasts sharply to the bill's meticulous enunciation of the factors to be considered in determining the amount of the punitive damage assessment. (§ 12(c)). That shortcoming could be rectified by either of two approaches. The bill could be rewritten to provide that the claimant shall recieve the entire punitive damage assessment up to a ceiling equal to the compensatory damage award (double damages). Alternatively, it could specify the criteria to be considered by the court, which might include such factors as whether the claimant's compensatory damages were reduced because of the claimant's responsibility for the harm, under Section 9; the difficulty and cost to the plaintiff of establishing the manufacturer's liability for punitive damages; and perhaps other criteria analogous to those that have been developed in the area of attorneys' fees.

The second difficulty with Section 12(f) of the working draft is the virtually unlimited discretion that it commits to the court in determining to whom and for what purpose the remainder of the punitive damages shall be assessed. No criteria are provided for the determination of what is an appropriate public purpose. The burden thus placed upon the court seems entirely inappropriate for a judicial officer. It is not difficult to imagine the pressures that might be placed upon the court by potential distributees, especially in those jurisdictions where members of the judiciary are elected and therefore vulnerable to political considerations. Such considerations might also be suspected in the selection of the person who is to act as the distributor. Potential for abuse breeds suspicion of abuse, which infects respect for the judiciary. This can be avoided, as can the expense attendant upon the distribution mechanism set forth in the statute, by the simple and obvious expedient of having the portion of the punitive damage assessment that is not awarded to the claimant be deposited in the Treasury of the United States. While Congress could, if it so chose, earmark such funds for some specific purpose, the public interest would

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to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, they can award some larger sum."
Rookes v. *Barnard*, [1964] 1 All. ER 367 (H.L.).

be quite adequately served were they simply to be available for appropriation through the normal processes.

Finally, the working draft effectively disposes of the pervasive problem of multiple punitive damage assessments, a problem that is especially acute in the product liability area. First identified by Judge Friendly in the *MER* cases,[20] the reality of this problem has become increasingly apparent.

The fifth amendment's double jeopardy clause proscribes multiple punishments for the same crime. Multiple punitive damage awards raise the same concerns of fairness and potential excessiveness. It is perplexing that a society that prides itself on its concern for justice should not be more outraged than it has shown itself to be by the prospect of defendants being punished over and over again for the same act. Yet that is exactly what happens under the present law of punitive damages.

One method used to ameliorate multiple punitive assessments and possible bankruptcy is the class action. There is only one punitive award made and subsequent actions are barred. However, class actions are extremely crude and cumbersome. The certification process alone can be quite lengthy and costly, burdening plaintiffs, defendants and the courts alike. Subclasses may be required to cope with the variations in state law governing punitive damages. Furthermore, a class action will not inevitably be allowed, even where there is substantial risk of multiple punitive damages assessments. Especially in products liability cases where plaintiffs' injuries differ in nature, extent and the time and circumstances of their occurrence. The mere existence of many plaintiffs and large claims are not likely to meet class action criteria.

The class action device simply can not adequately meet the problem of multiple punitive damage claims. The working draft does so by providing that, once a punitive damages assessment is made and affirmed, all other claims for punitive damages based on the same allegations are barred. (§ 12(6)(g)). It thus accommodates the goals of punishing and deterring defendants while avoiding the problems of the present system.

In conclusion, S. 44, both in its original version and the working draft, while it would not solve all of the problems attending the assessment of punitive damages in products liability cases, embodies a substantial improvement over present law. On balance, with the caveats and reservations mentioned above, the working draft is a substantial improvement upon the original version.

Senator KASTEN. Professor Ellis, thank you very much.

I just have one very quick question for Professor Popper. Do you believe, or I should say do you agree that the negligence standard in S. 44 for design defects reflects current law today?

Mr. POPPER. This, of course, has nothing to do with punitive damage.

Senator KASTEN. You said you supported a uniform bill, and you supported many of the parts of the bill, and I just wanted to know if you agree that the negligence standard for design defects reflects current case law today?

Mr. POPPER. In the design defect area, it is difficult to get an accurate reflection of current case law. If you look at the cases from the last 12 months—and I did that—I was asked to testify last Wednesday, and I have spent time doing nothing but—what you get is a very mixed picture.

A number of the more recent cases reflect a standard which, instead of following *Barker* v. *Lull* which defines the use of defects in terms of consumer expectations—uses a standard that roughly parallels this piece of legislation.

My own feeling is that in the design defect area, those States which have moved in the negligence direction are not necessarily in the majority. There is, however, a fairly large body of law that uses the negligence standard not unlike that which is in the bill. I do not think it is the enlightened standard. I do not think it is the

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[20] *Roginsky* v. *Richardson Merrell, Inc.*, 378 F.2d 832, 840 (2nd Cir. 1967).

standard that is born out of fairness or reason. My own reaction to the decision to define design defect by negligence is look, if you want to abolish 402(a) in the design defect area, why do you not just state that outright, instead of creating a negligence standard that interjects concepts of "expected use" in terms of the plaintiff's activity, or familiarity.

I think it is convoluted. I think it is unnecessary. I do not think it is necessarily out of sync with recent cases, though.

Senator KASTEN. Thank you.

Senator Heflin.

Senator HEFLIN. I have been reading this section on punitive damages, and I have got some real questions. Some of it I just do not understand. It seems to me that we are going to be turning over to a judge congressional powers, executive powers that were never intended under the concept of the separation of powers.

I would like to direct your attention to the fact that there is this provision on punitive damage; that after the judge makes it and he goes into the various factors—and these are Federal judges and State judges—he compensates the injured party to the extent of the compensatory damages, and to the punitive damages, and then he has the right to take the excess. And under the language, he takes the excess that he wants to, that he has set. And I suppose when he is establishing the amount, this could enter into his mind: "Shall order the distribution of any remainder to a person to be used for a public purpose designated by the court. The public purpose shall further the national interest in health, safety, education or the environment, and may reflect the nature of the harm"—it says, "may reflect the nature of the harm for which the punitive damage award is assessed." And then he, of course, has the right to review and to make accountings and all of that. So he selects some individual that he wants to to be a pro bono agent to do good.

Now, Mr. Clark, you know, I suppose, in Alabama we have a university called Auburn University.

Mr. CLARK. I would say give it to Alabama University.

Senator HEFLIN. Right now at Auburn University there is a legacy of a will that has designated that after a cat dies—the cat is now receiving the income that Auburn University receives, about $12 million. I suppose there are great cat lovers, as we have seen there, because somebody is seeing that the income from $12 million is going to one cat.

Now, here, a judge under this takes the money that he sets. A judge sets the amount, not a jury. He takes the money that he sets after he considers the work and nature of this; then he gets the right to go into the total resources and the condition of the business, the manufacturer of the product, seller, which to me is contrary to Alabama law and is sort of drastic, on looking at what the amount of punitive damages ought to be. And then he decides that he wants to help cats.

Now, I am not trying to downgrade cats. There are a lot of cat lovers. And so he, under this, wants to appoint somebody, and maybe he appoints one of your law partners, and he then, for the public purpose of the health, safety, and education, and it does not restrict it, for cats.

I do not understand what is the basic concept of the punitive damages being used here for some purpose in leaving it up to a judge to determine who gets it and for what purpose.

We have all complained in our lifetime about activist judges, and here we give judges a bag of money to be activist.

Now, what is the rationale behind this provision in this bill about the use of that?

Mr. CLARK. I guess that is the answer. The problem that why should an injured plaintiff who has been compensated by the compensatory damages have a windfall? So what do you do with the money that is created? Yes, there should be punishment to deter others from committing similar wrongs. I do not agree with you that this act contemplates giving it to an individual. I think that the definition of persons——

Senator HEFLIN. Well, that is what it says, to a person to be used. Suppose they give it to the American Association for the Advancement of Siamese Cats?

Mr. CLARK. You know, we put on the judges the responsibility if the verdict is not fair, if it is too excessive, or if it is too inadequate, to set it aside. This is a similar responsibility to do what should be done.

Now, the punitive damages is a windfall, and incidentally, that is where the use is with the plaintiff's lawyer in these lawsuits. That is where they make the big, big judgments. That is why the cases cannot be settled. And this is an effort at least to arrange for some way to inflict punitive damages on the wrongdoer. But why should that be for the benefit of the injured person when a very carefully thought out program of law is there for him to get compensatory damages?

Senator HEFLIN. Well, I might agree with you to some degree, but I do not understand why you are giving this power to a judge. We will forget cats. We will say he is going into some of these problems that this lady talked about, female problems. I mean legitimate problems.

Here, why are you giving it to a judge to do it? You are making a judge a social architect more so than he is now.

Mr. CLARK. Why under the Federal Tort Claims Act do you leave it to a judge what to do? There are certain instances where a judge—a thing like this could be better administered by a judge. You have the right to trial by jury.

Senator HEFLIN. Well, what do you want to—you are a proponent of this punitive damage concept. Now, you are making a judge, in effect, a miniature Congress to determine if there is to be appropriated a certain amount of money for a certain cause. You are making him a President where he, in effect, has got a right to veto it or sign it. And then you are giving him all of these concepts of accounting and everything else.

To me, I read this and I said, Well, what in the world are we doing? Are we going to make judges into everything? I mean, I can imagine what some State judge or some Federal judge—you and I know a few of our Federal judges, and we have tried a few lawsuits with them.

Now, would you want to trust them to decide what eleemosynary cause they wanted to further?

Mr. CLARK. You know, the judges in our district, I would trust any one of them. He would appoint a magistrate to look into the thing, and there are many ways that could be handled. I think by and large our judges I would trust them.

Senator HEFLIN. You would trust them all? You would give them all that authority?

Mr. CLARK. Yes, I would give them that authority. You know—and I say this sincerely—I come from Justin County, and up above our courthouse we have these words, "Exacting equal justice to every man of whatever State or persuasion." And the policy of this act here is just to even the ball game.

Senator HEFLIN. In other words, you are defending this situation of the public cause and the disbursement of the money for that purpose, and you say that that is a part of justice. I am just centering on this one thing.

Mr. CLARK. Well, you are centering on that one thing, and that would be a fiduciary obligation on the part of the judge, and I think by and large it could be discharged in an orderly manner.

Senator HEFLIN. Well, we differ.

Senator TRIBLE [presiding]. Senator Heflin, do you have further questions of these witnesses?

Senator HEFLIN. No.

Senator TRIBLE. This will be a good time to ask the questions.

Senator HEFLIN. Well, my red light is on.

Senator TRIBLE. Well, I am chairing the hearing now.

Senator HEFLIN. You go ahead.

Senator TRIBLE. No. I would rather have the last word. You go right ahead.

Senator HEFLIN. I believe I will end on the cats.

Senator TRIBLE. Let me just say, to put in balance perhaps the last element of that colloquy—and I apologize for my late arrival this morning; I was in Philadelphia, Pa., and it is a snowy day there—that punitive damages were not meant to compensate individual plaintiffs. Rather, they are to punish and deter. They are not meant as a windfall for a lucky plaintiff who happens to be in the right place at the right time. But rather, beyond punishing and deterring inappropriate conduct, it seems to me that the moneys derived from these kinds of judgments ought to serve some public purpose, some broader purpose, and that is the genesis for this particular provision.

The public purpose award originated, in my own mind at least, in Virginia in a 1976 criminal action. A subsidiary of Allied Chemical had dumped a toxic pesticide, kepone, into the James River, and Allied faced $13.5 million in fines. Allied subsequently announced the creation of the Virginia Environmental Endowment, an independent foundation, and endowed it with $8 million. The Federal judge, Robert Mehrige, immediately reduced the criminal fine by that amount.

The endowment has operated now effectively for 7 years. It has indeed served the public purpose. It has funded environmental research in projects with such diverse groups as the National Wildlife Federation, the Virginia Chamber of Commerce, the Nature Conservancy, the Virginia Institute of Marine Science. So that is the genesis of this provision.

It seems to me, on balance, although it may not be a perfect vehicle, it is better that the public be served and the national interest be responded to than some lucky plaintiff receive a windfall.

Gentlemen, I missed your testimony, but I am familiar with your statements generally. I have no further questions. I know you are busy, so I would excuse you at this point and thank you for being here today and for making the contribution you have made.

Now, I would invite all others to stay or leave as they see fit. I am going to take advantage of this opportunity, however, to make just a few statements about this legislation, and you all are excused. We will be glad for you to stay, but I know that you have places to go and things to do.

Let me just add, if I might, for the record—and my full statement, I understand, has been made a part of the record—some points why I think this particular provision is an important one.

I believe we have got to make a critical public policy choice: Should we continue to prevent the possibility that multiple punitive damage awards will damage and possibly bankrupt companies, costing jobs; should a few plaintiffs receive multimillion dollar windfalls and possibly prevent subsequent plaintiffs from receiving compensatory damages equal to the harm; or alternatively, should we adopt the new policy which adequately punishes and deters and does not destroy culpable manufacturers, which benefits the public purpose?

I would say to my friend we face an impending punitive damage crisis, and this amendment attempts to solve that problem. We limited punitive awards for any course of conduct to one, but that one may be as large as is necessary to properly punish and deter. It provides a portion of that award to the plaintiff. The remainder goes, as we have said, to a public purpose organization for health, safety, educational, or environmental purposes.

It partially bifurcates the trial. The jury disposes of the compensatory issues. Then, the same jury considers the punitive claim. The judge then determines the amount of the award. Finally, it parallels the original version of Senate bill 44 in other respects.

Now, what is this crisis we are talking about? Before 1976, according to research by Professor Wheeler at the University of Kansas, there were a total of three reported appellate affirmances of punitive damage awards in product liability cases. No award was for more than $250,000. Yet, in 1982 alone there were nine awards for more than $1 million each. There are now tens of thousands of punitive claims pending. Multiple liability for one corporate action is the problem. Simply put, today any company that mass produces a product is vulnerable to thousands or tens of thousands of punitive claims for a single corporate mistake. This liability can destroy a company, and it cannot be reduced through insurance, since most States prohibit punitive damage insurance.

This crisis was predicted many years ago by the eminent jurist, Federal Appeals Judge Friendly. In the first product liability punitive damages case in 1967, he said, and I quote:

> We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can avoid overkill. Innocent stockholders will suffer extinction of their investments for a single management sin.

As I said, punitive damages are not meant to compensate individual plaintiffs rather than punish and deter. Consequently, a plaintiff cannot claim them as a matter of right. Legal scholars unanimously agree they are not mandated by the Constitution, and in fact, four States—Washington, Nebraska, Louisiana, and Massachusetts—prohibited them altogether.

Therefore, constitutionally, as a matter of legal policy, there are no problems with limiting the number of awards or giving them to a public purpose. The genesis of this public purpose award was the 1976 criminal action in Virginia about which I have spoken.

Now, the amendment would allow the judge to award a portion of the punitive award to the plaintiff to insure that a plaintiff will vigorously litigate situations where punitive damages are appropriate. The plaintiff can be viewed here as a private attorney general who is bringing the corporate tort abuser to justice. The limitation is consistent, although not required by the limitation of punitive damages. Once a company has been adequately punished and deterred, public policy should allow it to continue free from the specter of future liability.

We have here an analogy, if you will, to double jeopardy. The quasi-criminal nature also leads to the conclusion that the award should benefit the public rather than a lucky plaintiff.

This amendment incorporates many of the ideas from the seminal scholarly works on punitive damages and products liability law by Prof. David Owen of the University of South Carolina, Prof. Malcolm Wheeler of the University of Kansas, Dan Ellis of the University of Iowa, and Victor Schwartz's work on the uniform act.

So for those and other good reasons, I would encourage the subcommittee and the full committee to consider this revision when this bill is considered.

If my distinguished colleague from Alabama has nothing further, we will bring the session to a close.

[Whereupon, at 12:25 p.m., the hearing was adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF THE AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS

On April 27, 1983 the American Federation of Labor and Congress of Industrial Organizations testified in opposition to the enactment of S. 44, the Product Liability Act, as originally introduced. Subsequently, on October 19, 1983, the sponsors of S. 44 put in a substantially amended version of the bill. The purpose of this statement is to supplement our earlier testimony with comments on those amendments.

In our judgment, S. 44 as it stands is, in a number of important respects, a substantial improvement over the bill as introduced. The section on the relationship between worker compensation and third party litigation, in particular, has been redrafted to answer prior criticisms and is now worthy of favorable consideration.

Despite these improvements, the AFL–CIO continues to oppose enactment of S. 44 principally for the following two reasons:

It is a rare day's news report that does not include a reminder of the harm caused by inadequately tested chemical compounds. Given the great number of these products entering commerce, the limited understanding of their possible toxic effects, and the long latency periods often involved, we do not believe that a lessening of the responsibility imposed on their manufacturers is the responsible course. In this regard, the AFL–CIO is particularly concerned about the effects of exposure to the panoply of toxic chemicals and substances being introduced into the workplace at an accelerating rate. The experience to date creates the gravest doubt as to care taken by those who formulate toxic substances. The comments of a chief executive officer of a large pharmaceutical company whose product was implicated in the death of over 40 people are sufficient to make our point. After a trial involving one of the victims, he admitted to "shortcomings" in his firm's failure to report overseas deaths to the Food and Drug Administration prior to licensing, based upon "inadequate systems to ensure that all reports of adverse reactions received abroad prior to U.S. approval were * * * forwarded and submitted to the FDA." So far as we have been able to determine, a strict liability standard provides the strongest incentive for the manufacture of safe and beneficial chemical products and such an incentive is urgently needed.

S. 44 goes a long way toward immunizing manufacturers from liability for failing to provide adequate warnings on dangerous substances. Under Section 6 of the bill, warnings need only be given to a worker's supervisor, with the result that if, for some reason, the warning is not conveyed by his supervisor, a worker who sustains a serious injury has no recourse against the manufacturer. For the reasons stated in our testimony, the AFL–CIO believes that a dangerous product should be clearly and explicitly labeled as such, for all to read, without regard to the minor extra cost of inconvenience involved. The safety and health of these workers who must work with hazardous products on a daily basis is paramount, and precludes any dilution of the applicable standard of care. The proper legal standard is not whether "reasonably prudent persons" might supply warnings; rather, it is whether the product seller or manufacturer accompanied his product with sufficient instructions and/or warnings so as to make the product safe for use.

STATEMENT OF PHILIP P. FRIEDLANDER, JR., EXECUTIVE VICE PRESIDENT, NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION

My name is Philip P. Friedlander, Jr., Executive Vice President of the National Tire Dealers and Retreaders Association [NTDRA], a national nonprofit trade association representing nearly 5,000 independent tire dealers and retreaders located in 50 states who are engaged in the wholesale and retail distribution of automobile and truck tires, the retreading of tires, and the sale of related products and services.

Mr. Chairman, I appreciate this opportunity to testify in support of S. 44, legislation to regulate interstate commerce by providing for a uniform product liability law. We contend that such legislation is long overdue.

Product liability law, in essence an outgrowth of the old common law concept of torts or wrongful damage, has become a morass. It has evolved into basically a system of no-fault insurance imposed by the courts upon industry. While lawsuits are ordinarily directed against manufacturers, it is not unusual for wholesalers, distributors and retailers to also be named as defendants.

As the bill sponsor Senator Robert Kasten contends, no area of civil law today is more confusing, more costly, or more counterproductive than product liability law. There exists no reasonable uniform national law. Approximately 30 states have product liability statutes, and no 2 are the same. Whether it be an injured consumer, or a manufacturer or retailer, product liability law is a legal quagmire of 50 different jurisdictions with conflicting and ever-changing rules.

The level of legal activism soar as the disparities become glaringly unjust. Earlier testimony before this committee indicates that the number of product liability suits filed nationally in 1974 totalled 1,579. By 1982 the number had risen to 8,944 and the 1983 figures are expected to be even higher. Certainly anyone wrongfully damaged should have access to the courts. But broad concepts of liability "externalize" the cost of negligence. If someone foolishly abuses a product, for example, why should fellow consumers subsidize his actions? The questions should be what is unreasonable abuse and what is forseeable. S. 44 would "internalize" the costs of torts with stricter limits on liability, which would arise only from unreasonably dangerous construction and design or from a failure to warn of danger or from a failure to live up to an express warranty.

Product liability has unfortunately expanded the litigiousness of American society and has caused some to raise serious concerns of legal ethics. Complex laws and precedents spur lengthy litigation which in many cases leads to exorbitant costs. Studies presented to this committee contend that for every 66 cents consumers attain in liability judgments, lawyers make 77 cents in legal fees.

Consumers ultimately pay the fare for these confusing product liability laws when the ever-increasing liability insurance rates are passed on in the form of higher retail prices. Rates are high because they are set on a national basis and respond to all vagaries and extremes in product liability case law. A single costly court decision could raise insurance rates nationwide. Such a situation is becoming a serious burden on interstate commerce.

Throughout the 1970's product liability insurance rates were established increasingly on a subjective basis. Addressing this reality Congress passed the Risk Retention Act of 1981. NTDRA supported that legislation which provided product sellers and manufacturers alternatives to commercial product liability insurance through the creation of risk retention or self-insurance groups or through purchasing groups which have the option of buying commercial insurance at favorable rates. The act intends to assure that insurance rates and premiums be set on a fair and equitable basis.

The Risk Retention Act did not address the uncertainty in the outmoded, fragmented product liability tort litigation system. S. 44 would protect the interests of consumers, insurers, manufacturers, and product sellers. Manufacturers remin liable if the claimant can establish by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product failed to conform to an express warranty. A product seller is liable only for his own fault—the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of a claimant's harm.

S. 44 stipulates that if a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product after 25 years from the original purchase date. Proper exceptions are made if the claimant's harm was caused by the cumulative effect of prolonged exposure to the product or if the harm did not manifest itself until after the time limitation. Claims for harms which do not manifest themselves until many years after product use are thus excluded from the proposed time limitation on liability.

S. 44 also considers provisions regarding the effect of compliance with government standards on the liability of manufacturers or product sellers from harm caused by a product. A product in compliance with existing standards could be found unreasonably dangerous only if the claimant could produce clear and convincing evidence that the product was unreasonably unsafe and that a safer design was technologically feasible and would have complied with all mandatory safety standards.

The product liability reform issue crosses traditional party lines. The Carter administration supported the concept of a federal statute; the Reagan administration has followed suit, endorsing S. 44.

Mr. Chairman, product liability is a growing problem of major concern. A fair and reasonable law should help unclog our courts, promote public safety and reduce consumer costs. S. 44 deserves consideration by this committee. NTDRA appreciates this opportunity to express its support for S. 44, and we urge prompt consideration by the full committee.

MACHINERY AND ALLIED PRODUCTS INSTITUTE,
Washington, D.C., March 12, 1984.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Subcommittee on Consumer, Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR SENATOR KASTEN: As the national organization of capital goods and allied products manufacturers, the Machinery and Allied Products Institute has long been interested in products liability. Accordingly, we greatly appreciate the opportunity to comment on S. 44, the Product Liability Act, as part of the recent Subcommittee hearing on that measure. We ask that this statement be included in the published record of the hearing.

According to Senator Bob Packwood's call of the hearings, its purpose was to ". . . focus on changes to the latest staff draft of S. 44 since the April 27 hearing." Our comment thereon is a brief one. Although certain of the changes do not, in our judgment, represent improvements in this very necessary reform measure, we are aware that the adoption of these changes constitutes a balancing of interests. So rather than quibble, we urge passage of S. 44 in its present form. It seems fair to observe that the proposed legislation has been studied and restudied; all viewpoints have been expressed and considered and now is the time for Committee and Senate action.

In examining the testimony of witnesses who appeared before you on March 5, we note that the proponents of the bill uniformly observed with care the announced guidelines for the hearing. Conversely, certain of the bill's opponents took advantage of the occasion not only to comment on amendments to the measure, but to denounce in florid rhetoric the purpose and content of the bill. It is that rhetoric—much of which demands an answer—that is the principal subject of this statement. Incidentally, we should emphasize that those statements on which comments are made constitute a representative sample and not an exhaustive listing of comments with which we take issue.

Let us begin with the testimony of the Honorable Jack Pope, Chief Justice of the Supreme Court of Texas. "The bill . . . usurps the judicial function of every state."

All of it? The fragment of Judge Pope's testimony quoted above is part of a longer introductory passage that reads in principal part as follows:

"The bill in our judgment usurps the judicial fuction of every state. The bill, if enacted, will disturb product law that is already uniform in important respects, and it will destroy the developed common law in the whole range of tort reparations. The bill will disrupt practices and procedures that have been simplified and will require every state to begin again. The bill require decades of interpertation to unravel new concepts and new definitions in the over-detailed provisions of the bill. It is a massive intrustion by the federal government upon the states."

As for the first of these unqualified assertions, the plain meaning of the language chosen suggests that the whole of the states' judicial functions would be usurped by adoption of this bill. This is obviously wrong. The fact is that a relatively small part—albeit a very important part—of tort law would become subject to federal statute. This hardly amounts to usurpation of "judicial functions."

Let us consider two more of the sweeping assertions contained in the passage quoted above. First, we are told that the bill, if enacted, would "disturb product law that is already uniform in important respects." This we believe is a flat contradiction of much testimony presented to members of this Subcommittee in past years on federal product liability legislation. One central purpose of the legislation is the achievement of uniformity in product liability laws among the several states. Although qualifying his statement by the phrase, "in important respects," Judge Pope rather strongly implies that the sine qua non of this proposal—uniformity of law among the states—has already been largely achieved. Contrast this implication with

the conclusion of the full Commerce Committee as reflected in its Report No. 97-670.[1]

"Even basic issues of product liability law, such as the standard for determining when a manufacturer is responsible for harm caused by a defectively designed product, have multiple variations in State law. For example, depending on which State law applies, a product may be defective in design if; (1) it fails to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner, or the defendant fails to prove that the benefits of the product outweigh its risks; (2) it is unreasonably dangerous taking into consideration the utility of the product and the risk involved in its use; (3) it would not have been put into commerce by a reasonable person aware of the harmful nature of the product; or (4) it left the supplier's control lacking any element to make it safe for intended uses or possessing any future that renders it unsafe for intended uses. Some States require proof that the design defect rendered the product "unreasonably dangerous," while others do not. A manufacturer seeking to avoid design defect liability faces the difficult task of meeting the design standard in each State in which it does business.

"The variations among the States on these and almost all other aspects of product liability law create uncertainty within the tort litigation system. Manufacturers who do business on an interstate basis in a national marketplace are unable to predict which of the multiple legal standards will apply to them or whether a particular standard will remain constant. This uncertainty is exacerbated because the legal standards are often incomprehensible and may be modified at any time by a court." (Footnotes omitted.)

Will the adoption of S. 44 ". . . destroy the developed common law in the whole range of tort reparations . . ."? Why should it? To repeat ourselves, S. 44 is not directed to "the whole range of tort reparations" but rather to one part of tort law. Judge Pope appears to imply that adoption of S. 44 would automatically affect the treatment in the state courts of other tortious acts. What about actions involving general liability? Slander and libel? Injuries to reputation? Actions alleging civil assaults? Obviously, the implication is false and misleading.

Next, we are asked to accept an assertion that "the bill will disrupt practices and procedures that have been *simplified* and will require every state to begin again." (Emphasis added.) To suggest that the practice and procedures of actions in tort have been "simplified" is a statement that invites doubt from many lawyers and ridicule from all laymen. As a matter of fact, by establishing a single set of practices and procedures applicable to product liability acts, S. 44 would do more to simplify procedures and practices than state courts have thus far accomplished and, above all, it would take the first indispensable step toward uniformity in this area.

Next we are told that adoption of S. 44 would ". . . require decades of interpretation to unravel new concepts and new definitions in the over-detailed provisions of the bill."

This assertion is supported only by a series of questions which inquire—frequently with an intimation of ridicule—as to the meaning of new concepts, etc. appearing in the bill. Such questions are rhetorical straw men designed for erection and demolition in a single sentence and should be so considered by the Subcommittee.

Finally, we confront the statement that adoption of S. 44 would constitute ". . . a massive intrusion by the federal government upon the states." Let us consider this "intrusion" in a broader perspective. The past five decades have witnessed a series of federal enactments of enormous sweep—control in the minutest degree of relations between employer and employee, very stiff environmental standards, civil rights legislation, price and wage controls, and the stipulation to the fraction of an acre of how much wheat one may plant, to name only a few. Given this background, can we seriously believe that the "intrusion" of S. 44 would be a massive one? When we consider the untidy and grossly unfair mess the courts have given us in product liability law, it seems to us high time that Congress "intruded." ". . . an orderly development of the law."

In his summing up, Judge Pope said, "We would hope that the goal to achieve fairness through comparative fault in products cases and a feasible uniformity will be ongoing. We respectfully suggest that we are reaching these goals in a manner that is achieving an orderly development of the law in each state without the disruption of our court systems."

To begin with, "feasible uniformity" is not enough. What is wanted is uniformity—period. Nothing less will do.

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[1] Product Liability Act—Report of the Senate Committee on Commerce, Science, and Transportation on S. 2631. Rep. No. 97-670, Dec. 1, 1982.

Beyond that, we feel obligated to comment on Judge Pope's asseveration that we are now being treated to an "orderly development of the law in each state." All our experience at MAPI suggests that the great diversity in state product liability law continues and that the statement made by the Senate Commerce Committee Report No. 97-670, and cited above, is as true now as when first made. For purposes of emphasis let us repeat one part of the statement:

"The variations among the States on these and almost all other aspects of product liability law create uncertainty within the tort litigation system. Manufacturers who do business on an interstate basis in a national marketplace are unable to predict which of the multiple legal standards will apply to them or whether a particular standard will remain constant. This uncertainty is exacerbated because the legal standards are often incomprehensible and may be modified at any time by a court."

We think the development of product liability law at the state level is not orderly but has been, and continues to be, altogether disorderly. Indeed, it seems to us that some state high courts have vied with their peers in reaching for new and novel theories of entitlement. Moreover, as current product liability actions involved ever increasing emphasis on "duty-to-warn" cases we have every reason to think that the present disorderliness will increase rather than recede under present law as it is announced by 50-odd state appellate courts. There seems to be no limit to application of the doctrine of "foreseeable misuse," a doctrine which can be quite simply expressed in these words: "If some idiot did it, it should have been foreseen."

We turn now to the testimony of Charles B. O'Reilly, Esq., of the Los Angeles law firm of Greene, O'Reilly, Agnew and Broillet. " . . . almost all states have enacted product liability laws."

The quotation above is part of the following introductory statement:

"In the proper exercise of the states' Constitutional right to enact laws for the protection of their citizens and property, almost all states have adopted product liability laws. These laws invariably included principles of strict liability.

"Both statements are questionable."

The clear implication of the first of these two statements is that product liability laws in the various states are in the form of statutory enactments. Aside from insignificant bits and pieces of interstitial statutes, the law of product liability is judge-made law. Judge-made law, that is, with assistance from the law professors who wrote, the Restatement (Second) of Torts.

Similarly, strict liability did not spring full-blown from the legislative brow. It is, of course, an ancient doctrine of the English common law which was judicially retooled in the '60s and '70s for application to products cases. The crucial element in this refitting job was Section 402A of The Restatement and which, consistent with the traditional view, recommended the application of strict liability to manufacturing defects. In applying Section 402A, some courts applied strict liability not only to allegations of manufacturing defects, but also to allegations of faulty design. There has been, and there remains, much difference of opinion among the courts as to the propriety of the across-the-board application of strict liability Mr. O'Reilly asserts, nonetheless, that these laws invariably included principles of strict liability. This is simply not true.

Referring once again to the Senate Committee's Report No. 97-670, the distinction appears in this language:

"The traditional view of strict liability limits the theory to manufacturing or construction defect cases and to breach of express warranty cases. This limit recognizes that manufacturers and product sellers are not accident insurers and, therefore, should not automatically pay for every product-related harm. * * *

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"These traditional justifications for strict liability are not present in design and warning defect cases. There is no objective measure for determining if a defect exists. In a design or warning case, the allegation is that the chosen design or warning was defective, rendering all products incorporating or using that design or warning defective. If strict liability is applied in these cases, the manufacturer could be responsible for product harms regardless of its care in designing or warning about the product. Recognizing that manufacturers are not insurers of their products, traditional tort law states that liability should depend on whether the manufacturer acted unreasonably in choosing the design or warning that the claimant alleges caused the harm." (Footnote omitted.)

It goes without saying that we favor the "traditional" view. We make these comments, first, to challenge Mr. O'Reilly's sweeping ovesimplification and, second, to question his statement that, "The Bill replaces these common law principles of product liability with obsolete traditional negligence principles."

As a matter of fact the bill preserves strict liability for application to cases of manufacturing defects and breaches of express warranties. It requires the application of negligence principles to design and failure-to-warn cases. Rather than replacing one with the other, S. 44, in our judgment, restores each to its rightful position, a conclusion apparently shared by the author of the Committee Report comment quoted above.

The last testimony from which we quote is that of Professor Andrew F. Popper, Professor of Law at the Washington College of Law and American University. " . . . a measure which would destroy centuries of carefully evolved case law."

This quotation appears in a longer passage of Professor Popper's testimony which reads like this:

"Given the enormous responsibility of the Congress in proposing a measure which would destroy centuries of carefully evolved case law every part of this draft must be given careful attention."

We are told that adoption of S. 44 ". . . would destrory centuries of carefully evolved case law. . . ." Professor Popper has got the cart before the horse. Strict liability as applied by state courts to products liability actions has already destroyed "centuries of carefully evolved case law." Even if S. 44 were as pernicious as Professor Popper makes it out to be, there is very little of the original common law in this area left on which the bill could work its evil. Strict liability in products cases as we know it—and as the courts apply it—is not the product of centuries but is a very recent creation, having been adopted in the course of the last two decades which is, of course, a mere blink of the eye in the life of the law. ". . . *the elimination of punitive damages would have a devastating effect on* **all** *plaintiffs in* **all** *product liability actions.*" (Emphasis supplied.)

In the sentence quoted above Professor Popper is alluding, of course, to that provision of Section 12 of S. 44 which would limit the recovery of punitive damages to one per product. However, by suggesting that S. 44 would devastate all plaintiffs in products liability cases, Professor Popper has let the cat out of the bag. Although punitive damages have always been considered a form of punishment to be invoked only where the defendant's conduct amounts to willful and wanton misconduct, the statement quoted above suggests that it is appropriate to demand such damages in all products cases. And that is close to what has been happening in the real world. A demand for punitive damages has very nearly become a routine part of the complaint in products cases.

Consider this comment by Professor Gary T. Schwartz at the University of California at Los Angeles School of Law.[2]

"Punitive damages are in the air, are on the move. They are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely 15 years ago. On the grounds that a 'dilapidated' downtown residential hotel violates the implied covenant of habitability, a Los Angeles jury recently subjected its owners to one million dollars in punitive damages." (Footnote omitted.)

Professor Schwartz's statement agrees with our experience at MAPI. Punitive damages are indeed "in the air," and the suggestion that limitation of such damages to one per product "would devastate all plaintiffs in all products liability actions" seems further to confirm this conclusion.

Although we do not agree in every detail with the present Section 12 of the working draft of S. 44, we think that all in all it is a much needed improvement, and we would be quite willing to accept the provision as written.

We have commented on the several overstatements and misstatements quoted above merely to set the record straight. We could have cited other statements of questionable accuracy, but we have no wish to lard an already bloated record with still more palaver. Our real purpose has been to spotlight the red herrings which these statements and more like them represent. The objective behind their utterance had, we suggest, two purposes. First, and notwithstanding the stated call of the Subcommittee, they are intended to reopen the central issue of the need for products liability legislation. Second, and perhaps more importantly, they contribute to the further delay of badly needed legislation.

This subject is not a new one before the Congress. Congressional consideration of products liability extends over a period of some eight years. The subject was examined by Senator Culver's Small Business Subcommittee, by Congressman LaFalce's House Small Business Subcommittee and by Congressman Preyer's Consumer Protection Subcommittee of the House Commerce Committee and all of this before your Subcommittee took the matter up. Moreover, this Subcommittee has considered the

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[2] Southern California Law Review, Nov. 1982, p. 133.

matter in two Congresses, having issued a very useful Committee Report on the subject to which we have repeatedly alluded herein. The need for such legislation as evidenced in that Committee Report of December 1, 1982 is greater than ever. The Defense Law Journal, Vol. 33, No. 1, 1984, published by The Allen Smith Company, Indianapolis, Indiana, had this to say in an article entitled, "Review of Recent Tort Trends," by William Knepper:

"In fiscal year 1983 the product liability complaints filed in the federal district courts increased to 9,221 compared with 8,944 in 1982. The total showed a 100% increase over a five-year period."

Products liability continues to be a "growth industry."

Because it is a presidential election year the time available for legislative action is limited. We say report the bill to the floor of the Senate promptly and vote it up or down.

Respectfully,

CHARLES W. STEWART, *President.*

HOFSTRA UNIVERSITY,
SCHOOL OF LAW,
Hempstead, N.Y. March 16, 1984.

Hon. ERNEST F. HOLLINGS,
Ranking Democrat, Senate Commerce Committee,
Washington, D.C.

DEAR SENATOR HOLLINGS: The purpose of this letter is to express my serious misgivings with the October 19, 1983 Staff Working Draft of S. 44. As you may be aware, my position is that a well-drafted National Product Liability Act which pinpoints specific problem areas is warranted and within the realm of the possible. I have set forth my views on this extensively in dealing with one of the previous drafts of S. 44 (S. 2631) in an article entitled, National Product Liability Legislation: In Search For the Best of All Possible Worlds, 18 Idaho L. Rev. 411 (1982). I thus do not share the view of the trail bar that *any* national legislation on product liability is uncalled for. However, in many ways the October 19, 1983 Draft may yet be the worst of the versions to be presented for consideration. Admittedly, some very objectionable and confusing portions present in earlier drafts have been deleted. But this draft has introduced sections that are obtuse, confusing and simply unfair. Strangely, the unfairness is not only to the consumer. Some sections are unfair to the business community as well.

I have always believed that there is no such thing as a good "consumer bill" or a good "industry bill". Utimately, this bill will find its way into every city and hamlet in this country, and will perforce be interpreted by thousands of trial judges. A bill which is obtuse and complex will only spawn endless litigation as to its meaning. Thus, the structure of a bill which seeks to encompass the entirety of litigation problems is begging for trouble.

Two hundred years of tort law cannot be neatly compressed into several pages of legislation, without raising endless questions that will demand new interpretation by the courts. It is not just that this bill has not done it effectively. It is simply beyond the capability of any draftsman. A more focused and limited approach which takes dead aim at the major problems causing confusion today can be accomplished without all the unfairness and complexities of S. 44. With this preface, I now turn to my analysis of S. 44. In truth, this new draft warrants a study as detailed as my Idaho article dealing with 2631. Time constraints make it literally impossible to accomplish such a study at this time. I shall therefore hit the high spots as I now see them.

As you requested, I set forth a brief biographical statement which indicates my research and writing in the product liability field:

"Aaron D. Twerski: Professor Law, Hofstra University. A.B., 1960, University of Wisconsin, Milw.; J.D. 1965, Marquette University. Former Associate Dean and acting Dean, Hofstra University Law School; Teaching Fellow, Harvard University; Visiting Professor, Boston University; Visiting Professor, Cornell University; Professor, Duquesne University. Author, Case on Products Liability; co-author, Products Liability and the Reasonable Safe Product—A Guide For Management, Design and Marketing (rev. 2 ed. in progress); and author and co-author of numerous law review articles, incluidng Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts; 57 N.Y.U. L. Rev. 52 (1982); Shifting Perspectives in Products Liability: From Quality to Process Standards, 55 N.Y.U. L. Rev 347 (1980); The Use and Abuse of Warn-

ings in Products Liability-Design Defect Litigation Comes of Age, Corn, L. Rev 495 (1976); Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era, 60 Iowa L. Rev. 1 (1974). Investigator, National Science Foundation, Study of Litigation Process in Products Liability.

"I have written extensively of Product Liability legislative proposals. A Critique of the Uniform Product Liability Law—A Rush to Judgment, 28 Drake L. Rev. 221 (1978-79); Rebuilding the Citadel—The Legislative Assualt on the Common Law 15 Trial 55 (1979); National Product Liability Legislation: In Search For The Best of All Possible Worlds, 18 Idaho L. Rev. 411 (1982), [an analysis of the Kasten Bill]."

ANALYSIS

1. Relationship between Sec. 3 and other parts of S. 44. Sec. 3(a) provides:

"This Act governs any civil action brought against a manufacturer or product seller for loss or damage caused by a product, including any action which before the effective date of this Act would have been based on: (1) strict or absolute liability in tort; (2) negligence or gross negligence; (3) breach of express or implied warranty; (4) failure to discharge a duty to warn or instruct; or (5) any other theory that is the basis for an award for damages for loss or damage caused by a product. Any civil action brought against a manufacturer or product seller for harm caused by a product is a product liability action."

The all-encompassing nature of this section which makes the Act applicable to every conceivable cause of action can have some highly undesirable consequences. For example, if one reads this section together with Section 9, which makes comparative responsibility applicable to all claims brought under the Act, it would mean that comparative negligence is a defense to express warranty; consider the following case:

"Plaintiff was injured when a poorly beaded tire on his car blew out. At the time of the accident plaintiff was speeding (55 mph in a 40 mph zone) fifteen mph over the limit. The evidence is such that had plaintiff been driving at the appropriate speed limit he would have been able to bring his car under control and could have avoided impact."

Clearly, plaintiff is entitled to expect that a tire would not explode at 55 mph. Plaintiff's conduct may be negligent vis-a-vis other drivers, but it should not be considered at all in respect to the tire manufacturer. Thus "testing for the warranty" has never been considered to be contributory fault. See *Bahlman* v. *Hudson Motor Co.*, 290 Mich. 683, 288 N.W. 309 (1939). A consumer whose use of the product is within the express provisions of the warranty should not have his recovery reduced by comparative fault. It certainly should not be available as a defense to outright fraud and misrepresentation, yet Sec. 3(a)(4) includes "any other theory that is the basis for an award for damages". It is simply indefensible to utilize comparative fault as defense to such actions. See Twerski, From Defect to Cause to Comparative Fault-Rethinking Some Product Liability Concepts, 60 Marq. L.Rev. 297, 341 (1977). In my opinion, comparative fault ought not to reduce the verdict in the tire blowout case, even if the case were not based on express warranty or fraud. But the broadside application of Sec. 9 to all causes of action makes it all the more indefensible.

Another kind of case to which comparative fault would attach is that exemplified by *Austin* v. *Ford Motor Co.*, 86 Wis.2d 628, 273 N.W.2d 233 (1979). In that case, plaintiff was speeding and was thrown from her car subsequent to the collision. Plaintiff was killed because her seat belt failed to hold. The seat belt broke due to defective weaving of the belt (production defect). The Wisconsin Court refused to consider her speeding in relation to her second collision injuries. The duty to provide a seat belt that worked in the event of a collision was meant to protect both negligent and non/negligent drivers. S. 44 as presently drafted would preclude the result reached in Wisconsin.

Finally, several courts have found that comparative fault is particularly inappropriate when the defect is the failure of the manufacturer to introduce a safety device that would protect consumers from their own inadvertence or inattention. These cases arise with considerable frequency with regard to industrial machinery. A moment's inadvertence (negligence, if you like) can result in a lost arm or leg. In *Suter* v. *San Angelo Foundry & Machine Co.*, 81 N.J. 150, 406 A.2d 140 (1979), the court noted:

"The imposition of a duty on the manufacturer to make the machine safe to operate whether by installing a guard or, by making it inoperable without a guard, means that the law does not accept the employee's ability to take care of himself as an adequate safeguard of interests which society seeks to protect. . . .We see no reason to depart from Bexiga's elimination of contributory negligence where an em-

ployee is injured due to a defect (whether design or otherwise) in an industrial accident while using a machine for its intended or foreseeable purposes. *The defendant manufacturer should not be permitted to escape from the breach of duty to any employee while carrying out his assigned task under these circumstances when observance of that duty would have prevented the very accident which occurred.*" (Emphasis added.)

The court made it clear that its policy decision would prohibit the use of comparative fault from reducing the plaintiff's verdict in this kind of case. In a series of cases the Michigan courts have noted the incongruity of barring a plaintiff from recovering, when the defendant's duty was to prevent the plaintiff from encountering the danger by designing safety into industrial machines. *See Tuikku* v. *Macworth Rees Div. of Avis Industries, Inc.*, 406 Mich. 615, 281 N.W.2d 291 (1970); *Timmerman* v. *Universal Corrugated Box Machinery*, 93 Mich. App. 680, N.W.2d (1979). Sensitive drafting could allow for the general application of the comparative fault doctrine preserving to the states the right to make exceptions in the interests of justice. As it stands, the bill overreaches considerably and needlessly interferes with the rights of states to fashion common law doctrine in this sensitive area.

2. Sec. 2(6)9c) provides:

" 'harm' means (A) physical damage to property other than the product itself; (B) personal physical illness, injury, or death of the claimant; or (C) mental anguish or emotional harm of the claimant caused by the claimant's personal physical illness or injury; 'harm' does not include commercial loss . . ."

As written, the statute appears to prohibit the recovery of commercial loss arising from personal injury. Thus, a plaintiff who suffers personal injury and consequential loss of earnings because of inability to attend to business (commercial loss) could not recover. This was certainly unintended by the drafters. It is, of course, contrary to case law.

The requirement that mental anguish cause the claimant's physical illness or injury runs against two developing strains of case law. Many courts have found the physical illness requirement to be imprudent. Rather, than focusing on the bona fides of the mental distress, the emphasis is on "producing" the kind of "physical illness" that would meet the statutory definition. See e.g., *Culbert* v. *Sampson's Super Market*, 444 A.2d 433 (Maine 1983); The Maine court opted for a "serious mental distress" test rather than focusing on physical illness. This appears to be the more sensible approach, since it avoids much of the posturing which encourages the fabrication of phony "physical" symptoms. The second line of cases which are affected by this statute are the bystander cases. There are several holdings in which courts have said that they cannot distinguish bystander recovery in a product liability case from that of any other situation. See, e.g., *Walker* v. *Clark Equipment Co.*, Iowa ; N.W.2d (1982). Since a fair number of courts permit bystander recovery for mental distress, *e.g.*, *Dillon* v. *Legg*, 68 Cal. 728, 441 P.2d 912 (1968); *Corso* v. *Merrill*, 119 N.H. 647, 406 A.2d 300 (1979); *Sinn* v. *Burd*, 486 Pa. 146, 404 A.2d 672 (1979), it would be unwise to have two bodies of tort law for products and non-products cases with differing results in the same jurisdiction. It is impossible to account for varying fact patterns by statutory drafting. Consider the recent case of *Kennedy* v. *McKesson*, 58 N.Y.2d 500, N.E.2d (1983) where a dentist who innocently administered nitrous oxide to a patient rather than oxygen, brought suit against the company that had overhauled the anesthesia dispensing machine and had reversed the labels on the dials. The patient died as a result of the negligence of the manufacturer and the dentist suffered serious mental distress, since he had been the doctor who administered the anesthesia, thus killing the patient. Under 2(6)(c), the doctor could not recover for mental distress. Although the New York Court of Appeals denied recovery in this case (in the face of a strong dissent), most courts would most probably have allowed recovery. Surely, recovery should not be precluded by a federal law in a case of such bona fide mental distress.

3. Sec. 3(b) provides:

"No person may recover from any loss or damage caused by a product except to the extent that the loss or damage constitutes harm. A civil action for loss or damage caused to a product itself or for commercial loss is not a product liability action, and shall be governed by applicable commercial or contract law."

To demonstrate the injustice of this section, let me relate to you a case that is presently in litigation in New York. Plaintiff, the owner of a restaurant, brought this action against Long Island Lighting Company and Transcontinental Gas Pipeline Company. In January 1981, PCBs were found in gas lines and gas meters that serviced plaintiff's restaurant. PCB is a lethally dangerous toxic substance and a known carcinogen. As a result of the presence of PCBs at the restaurant premises, LILCO sent testing and investigation teams in "space suit" type of outfits. The

impact on the restaurant's business was sudden and immediate. Patrons refused to subject themselves to the danger of PCBs, and the restaurant was forced to close. I would assume that under the Act this would be commercial loss and any tort action would be precluded. But note, this is not the simple case of a product that failed to properly work, thus causing commercial loss. The commercial loss was a direct response to a clear health threat caused by an unreasonably dangerous product. There is no reason for national legislation to foreclose recovery in this type of case.

The case law with regard to economic loss is not in a state of disarray. The vast majority of courts have dealt responsibly with the question and have not permitted action for economic loss where contract or Uniform Commercial Code rules should govern. See, e.g., *Two Rivers Co.* v. *Curtis Breeding Serv.*, 642 F.2d 1242 (5th Cir. 1980); *Moorman Mfg. Co.* v. *National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982). There is no evidence that courts are mistreating the subject and that legislative action of any kind is called. This section simply ties the hands of courts for no good reason, prohibiting them from allowing the common law process to work. Furthermore, the limitation in Section 3(b) against recovery for "loss or damage caused to a product itself" is against the great weight of the case law. If a car explodes due to defective wiring, thus causing total loss of the car itself, there is no good reason that plaintiff should be at the mercy of a six-month or one year limited warranty. The car was defective and unreasonably dangerous and caused classic tort damage. Case law in general is *contra* to the proposed statute. See *Moorman Mfg. Co.* v. *National Tank Co.*, supra; *Pennsylvania Glass Sand Corp.* v. *Caterpillar Tractor Co.*, 652 F.2d 1165 (3rd Cir. 1981); *Seeley* v. *White Motor Co., 63 Cal.2d 9, 2103 P.2d 145 (1965); Cloud* v. *Kit Manufacturing Co.* 563 P.2d 248 (Alaska, 1977); *Russell* v. *Ford Motor Co.*, 281 Or. 587, 575 P.2d 1383 (1978).

This section again demonstrates the folly of legislating in a non-problem area. It has significantly cut back on rights presently available to consumers. It deprives the courts of discretion to decide commercial loss cases in favor of plaintiffs where the loss, although commercial, is more readily analogous to tort law (*e.g.*, the restaurant case). And all this in an area where the law is well settled and working well.

4. Section 4(1)(A):

I have provided an extensive critique of this section in my Idaho article at 18 Idaho L. Rev. 419–421. I have yet to hear a reason for legislating in an area in which are no perceived difficulties tying the hands of the courts to deal with the problems I have set forth.

5. Sec. 4(2):

This section provides that as a predicate for liability that:

"The claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant."

My objections to this section are several. First, it seems to me that the plain language of the statute precludes the application of the *Sindell, Collins and Abel* solutions to the defendant identification problem. It is, of course, possible that courts will not read it to have preclusive effect. However, the plain language requires that the unreasonably dangerous aspect of the product be a proximate cause of the harm. One must remember that 50 state courts and the various circuits will be interpreting this language. There is at the very least room for confusion.

My objection to this section is, however, more fundamental. For liability to attach, it is necessary that "the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant." This requirement paraphrases good hornbook law. Plaintiffs bears the burden of proving causation. If the courts will fall back on longstanding precedent to give meaning to the statutory language, little will have been gained or lost by the enactment of the this section. However, one cannot be assured that a new statutory scheme will not reopen the causation question anew. By mandating that the "unreasonably dangerous aspect" of the product be the proximate cause of the harm, the statute places emphasis on the "but-for" test. It is only by structuring a hypothetical situation in which the defect is removed from the scene, that one can determine whether the aspect of the product was the cause of the harm. Yet, it is a rather badly kept secret that the but-for test has been honored more in the breach than in the observance. In the real world, causation is so closely tied to liability that they cannot be torn asunder. To mandate that the but-for test be actually established by a plaintiff is sheer folly. Thus, courts will either ignore the statute, as they have ignored the common law rule that cause-in-fact be proven by a preponderance of the evidence, or plaintiffs will be barred from recovering in cases where it is entirely legitimate for them to win.

In any event, new statutory language will require courts to interpret concepts anew. Thus, settled case law which gives direction to litigants will be undone. This is certain to result in high start-up costs for the bill and high litigation expenses. Once again, there is no evidence that proof of causation is a special problem area in product litigation. The statute thus addresses a non-problem by enacting a common law approach into what may become an ironclad rule. If the legislation were structured to address only problem areas, there need by no section with this aspect of causation.

6. Sec. 5(b) (1)(A) provides:

"A product is unreasonably dangerous in design or formulation if, at the relevant point in time—

(A) the manufacturer knew or, through the exercise of reasonable prudence, should have know about the danger which allegedly caused the claimant's harm; . . ."

As presently drafted, this is one of the most outrageous sections of the Act. It is in clear derogation of the common law and is simply unfair. This section provides that a defendant is not liable unless it knew or should have known about "the danger which allegedly caused the claimant's harm." What this means is that the defendant could have been knowledgeable about many potential harms, thus rendering his conduct clearly negligent; yet the defendant would be absolved from liability because it did not know of the specific harm which caused the plaintiff's injury.

Consider the manufacturer of a chemical who permitted a contaminant to be present in a product which was known to cause liver tumor, skin diseases and lung cancer. Defendant continues to sell the product, exposing the public to these risks, rather than removing the contaminant from the chemical formula. Later it is discovered that the chemical also causes testicular cancer and birth defects. Under the proposed statute the defendant would be absolved from liability because at the relevant point in time the defendant didn't know his product would cause birth defects and testicular cancer. Similarly, if a machine failed to have a safety guard at the point of operation which would have prevented a worker from getting his fingers enmeshed in the machine while working, and instead plaintiff tripped on a piece of bailing wire and while breaking his fall his hands got caught in the machine, there would be no recovery. Again, "the danger" would not have been foreseeable although other similar dangers were highly foreseeable.

This is not the law now and never has been the law. What this draft has done is to exclude from liability risks which are not identical to those which defendants should have foreseen. As Judge Friendly noted in the landmark case of *Petition of Kinsman Transit Co.* (Kinsman No. 1) 338 F.2d. 708 (1964):

"[W]e would find it difficult to understand why one who had failed to use the care required to protect others in the light of *expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded.* Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken . . . *the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation* . . . (Emphasis added.)

"We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because *the chance of its occurrence, if viewed alone may not have been large enough to require the exercise of care.* By hypothesis the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability. (Emphasis added.)

No lesser an authority than Professor Victor Schwartz has recognized that the foreseeability of the particular risk rule is simply unworkable as the sole test for proximate cause. Prosser, Wade and Schwartz, Cases and Materials on Torts, are unmistakeably clear on this point. They argue:

"Suppose that a truck is driven at excessive speed. It is relatively easy to say that the total risk, made up of the aggregate of all of the possibilities of harm, whether they are very probable or fantastic, is so great that the reasonable man of ordinary prudence would not do this, and therefore the driver is negligent *How easy it is, by a process of fragmentation of the risk, to separate our particular consequences and interventing factors, and to say that they are, or are not, significant parts of the*

original total foreseeable risk? Is it "foreseeable," in any sense that the reasonable driver could have the possibility in mind, and so take precautions against it, that

"1. The driver will hit another car and kill a man?

"2. The car with which he collides will be thrown out of control, and hit a third car, or even a fourth? Springer v. Pacific Fruit Exchange (1928), 92 Cal.App. 732, 268 P. 951.

"3. He will endanger a pedestrian, who will fall and injure himself in a frantic effort to get out of the way? Tuttle v. Atlantic city R. Co. . . .

"4. He will endanger a child in the street, and a man who tries to rescue it will sustain a broken arm? Wagner v. International R. Co. . . .

"5. The truck will narrowly miss a pregnant woman, who will be frightened into a miscarriage? Cf. Mitnick v. Whelan Bros. (1932), 115 conn. 650, 163 A. 414.

"6. He will hit a pedestrian, who will be left helpless in the street, and he run over by another car? Bunda v. Hardwick (1965) 376 Mich. 640, 138 N.W. 2d 305.

"7. He will cause a collision, which will leave wrecked cars blocking the highway, and another driver will run into the wreckage? Holmberg v. Villaume (1924) 158 Minn. 442, 197 N.W. 849.

"8. He will hit a pedestrian, and while the man is unconscious, his watch will be stolen? Cf Brower v. New York Central R. Co. (1918) 91 N.J.L. 190, 103 A. 166.

"9. The person he injures will contract pneumonia because of his weakened condition, and die of it? Wallace v. Ludwig . . .

"10. The injured man may suffer a second accident six months later while he is walking on crutches? Squires v. Reynolds, *supra* . . .

"11. The injured man will receive negligent medical treatment, and die or be further injured because of it? Jess Edwards, Inc. v. Goergen, . . .

"12. The truck will knock a car up against a stone wall. The wall is weakened and, as a result, a stone falls off the top a day later and injures a pedestrian. Cf. In re Guardian Casualty Co. (1938) 253 App. Div. 360, 2 N.Y.S. 2d 332.

"All of these things have happened and there have been holdings that each was "proximate." Is it perhaps overloading the risk concept to make it the basis for determining each of these situations? (Emphasis added.)

Prosser, Wade and Schartz, Id. at 364–366.

7. Sec. 5(b)(2)(A) provides:

"(2) A product is not unreasonably dangerous in design or formulation if the manufacturer proves by a preponderance of the evidence that, at the relevant point in time—

"(A) a means to eliminate the danger that caused the harm was not within practical technological feasibility, and the benefits and usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm;"

This section is simply unintelligible when placed side to side with Sec. 5(b)(1). Sec. 5(b)(1) places the burden of proof with regard to negligence on the plaintiff in a design defect case. Sec. 5(b)(2)(A) speaks to the self-same issue, i.e., the risk-utility trade-offs to be made at the "relevant point in time" and places the burden of proof on the defendant. It is simply not understandable how both the plaintiff and the defendant are to carry the burden of proof on the same issue. This section is guaranteed to drive trial judges to drink and will be the subject of countless appeals. Ultimately, the United States Supreme Court will have to interpret its meaning. Until that time, trials and retrials will take place, thus exacting high litigation costs. Indeed, there is an argument (and a rather good one) to be made that the statute has enacted *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978) into a national rule of decision. This widely criticized decision has placed the burden of proof on the risk-utility issue onto the defendant. *Barker* may have been one of the major reasons to enact a natinal product liability bill. Defendants correctly complained that placing on defendants the burden of proof to demonstrate that a product was not unreasonably dangerous is to require them to prove a negative. This is rarely the burden of defendants in civil litigation. See Schwartz, Foreward: Understanding Products Liability, 67 Cal. L. Rev. 435 (1979). Yet, how else is one to read Sec. 5(b)(2)(A)? I am at a loss to understand how the manufacturers lobby can back a bill that may catapult *Barker* into national law. I can ony conclude that the two sections are conflicting, confusing and dangerously vague.

8. Sec. 5(b)(2)(B) provides:

"A product is not unreasonably dangerous in design or formulation if the manufacturer proves by a preponderance of the evidence that, at the relevant point in time—

"(B) the harm was caused by an unavoidably dangerous product . . ."

Sec. 5(B)(3) explains the meaning of Sec. 5(B)(2)(B).

It provides:

"As used in paragraph (2)(B), "an unavoidably dangerous product" means a product that, at the relevant point in time—

"(A) is useful and desirable to the public;

"(B) has a known but reasonable risk which, in light of the state of scientific and technical knowledge at that time, can not be made safe without impairing the effectiveness of the product's intended and ordinary use; and

"(C) would have been made by a reasonable manufacturer using that particular design or formulation.

This section is designed to protect the manufacturer from liability for technological changes which could not have been accomplished at the time of manufacture. To appreciate the difficulties with this section, one must begin with the basic standard of liability set forth in section 5(b) which provides that a manufacturer is only liable for defective design if at the time of manufacture a reasonably prudent manufacturer would not have used that design. The obvious next question is, what does the "unavoidably dangerous" section add to the liability standard as already articulated? There are several possible answers. The first is that it is not intended to add anything at all, but merely to emphasize the obvious: negligence is the operative standard and "we really mean it." If that were the sole interpretive possibility, the section would be comparatively harmless. However, courts are not likely to read a statute in that manner. They are likely to come across the language which enjoins a court from finding a product defective if the dangerous aspect of the product could not have been eliminated "without impairing" its effectiveness. This, then, amounts to something less than a negligence test. One is not required to utilize even well founded technology if to do so would impair the usefulness of the product. Since this is something other than the "reasonableness" standard, it must mean that the product is exempted from liability, even if the usefulness of the product is such that it would otherwise not pass the negligence test, or that other more desirable substitutes are available. The product is isolated for special examination and is held to a special standard, not to be compared or judged against other products in the field. What possible justification can there be for this exemption?

If there is any doubt that this section establihes a lesser standard of liability, attention should be directed to section 2(9), the definitional section of S. 44, which defines the term "practical technological feasibility" to mean: "the technical and scientific knowledge relating to the safety of a product which, at the time of manufacture of a product, was developed, available and capable of use or implementation in the manufacture of a product, and economically feasible for use by a manufacturer. Sec. 5(b)(2)(A) requires that all products meet the "practical technological feasibility" standard. Section 5(b)(2)(B) clearly establishes a test for elimination of danger through design alternatives that is less stringent than that set forth in the "practical technological feasibility" definition.

There is yet another practical question which these sections leave unanswered. Which products are to be subjected to the lesser "unavoidably dangerous" standard set forth in section 5(B)(2)(B), and which will have to meet the "practical technological feasibility" standard of 5(B)(2)(A)? The answer, of course, is that "unavoidably dangerous" products will have to meet the 5(B)(2)(B) standard, and regular products will meet the 5(B)(2)(A) standard. However, that is bound to lead us to perfectly circular reasoning unless there is a preconceived definition of "unavoidably dangerous" products. Since the Senate Bill defines the category in terms of the liability test and not in terms of a preconceived definition, there is no way to break the circle.

Finally, if one were inclined to create a definition of unavoidable danger, the endeavor would be a fruitless one. Admittedly there are dangers that are unavoidable, such as the risk of an allergic reaction to penicillin, but, there is no need to create a special category to absolve penicillin from liability. Given the reasonableness standard, penicillin is simply not unreasonably dangerous. Its benefits far outweigh its known risks. It may be necessary from time to time to warn consumers about unavoidable risks, but section 5(b)(2) does not address the failure to warn question, only design defect. Section 6 of S. 44, which deals with failure to warn, does not, nor could it in good conscience, take the position that there is no duty to inform consumers about unavoidably dangerous aspects of a product. Thus, the so-called "unavoidably dangerous" product is either reasonably designed or one whose danger has been adequately warned against. Only wholesale confusion can be wrought by embodying the improvident Restatement (Second) of Torts section 402A(k) into national legislation. It is either wrong or unnecessary. The greater likelihood is that it will not be treated as surplusage and will thus involve the courts in trying to place certain products in either one or the other category. Since the Senate Bill offers no

definition, and since no logical one appears available, the courts will be off on a fool's errand. This section should be excised from the bill.

9. Sec. 5(b)(2)(c) provides that a product is not unreasonably dangerous if:

"(C) the harm was caused by an unsafe aspect of the product which was an inherent characteristic of the product and which would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community.

This is another poorly worded section that is destined to cause courts to submit it for interpretation to the Oracle at Delphi. There are three options as to its meaning: (a) it is benign and hence unnecessary; (b) it is a devious articulation of the patent danger rule; and (c) it is unintelligible.

The first option is that this section is meant to preclude recovery for allergic reactions to such "inherently" innocuous substances as strawberries; or persons suffering physical ailments due to the cholesterol content of butter; or liver changes as a result of long-term alcoholism. If this is the purpose of the statute, it is totally unnecessary. There is, to my knowledge, not a single case imposing liability on a manufacturer for harm arising from such innocuous substances.

A court interpreting this section is not likely to find that it meant to legislate a non-problem. It is much more likely that a court will read this language to express (somewhat clumsily) the patent danger rule. This totally discredited doctrine immunizes a manufacturer from liability when the danger is open and obvious. The term, "inherent characteristic", when combined with the latter part of the statute which limits liability, if such a characteristic "would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community", certainly smacks of the patent danger rule. The statutory language appears to track Comment i of Restatement (Second) of Torts Sec. 402A. That section provides:

"The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. *The article sold must be dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.* Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

In an article dealing with the consumer expectation test, I reviewed the case law and demonstrated that

Comment i has been misinterpreted by a number of courts as a form of the patent danger rule. A. D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L.Rev. 861, 929. Also see, *Vineyard* v. *Empire Machine Co.*, 119 Ariz. 502, 581 P.2d 1152 (Ct.App. 1978); *Hartman* v. *Miller Hydro Co.*, 449 F. 2d 191 (10th Cir. 1974). In fact, the Montana Supreme Court, in *Stenberg* v. *Beatrice Foods Co.*, 176 Mont. 123, 576 P.2d 725 (1978), indicated that it would not be lulled by the Restatement language into adopting the patent danger rule sub silentio. In *Stenberg*, the plaintiff lost his arm when it got caught in the intake end of a grain auger. The design defect alleged was the failure of the machine to be equipped with proper shields and guards. The jury, at one point, was instructed that to find the product unreasonably dangerous, it must find the product " 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it . . . .' " The court found this instruction erroneous. It stated:

"The problem with using the Restatement definition of "unreasonably dangerous" is well illustrated by what happened in this case. Defendant manufacturer consistently maintained it was not liable as a matter of law because the unshielded intake end of the grain auger could be seen by an ordinary consumer or user of the product, and therefore the danger could be contemplated. Plaintiff did not dispute that he saw the unshielded intake end of the grain auger, and he also recognized it as being dangerous. Surely, if he could see the danger, he could contemplate the

danger. *Under the court's instruction therefore, it was a simple matter for the jury to conclude that the unshielded intake end of the grain auger was not unreasonably dangerous, because plaintiff saw it and could contemplate what he had seen.*

". . . Under this type of instruction it would be virtually impossible for an open and obvious condition to be unreasonably dangerous. For all practical purposes recovery would be limited to latent conditions." (Emphasis added.)

It is virtually certain that Sec. 5(b)(2)(c) would be regularly given to juries as an instruction in patent danger cases. The result would be to accomplish the evil which the Montana Supreme Court suggested is to be avoided. The patent danger rule should not be formally reintroduced into the law nor should it re-enter through the rear door by the utilization of Sec. 5(b)(2)(c) as a jury instruction. Courts and scholars have

found it to be highly objectionable. See, e.g., *Mitchell* v. *Fruehauf Corp.*, 568 F.2d 1139 (5th Cir. 1978); *Dorsey* v. *Yoder Co.*, 331 F.Supp. 753 (E.D. Pa. 1971), *aff'd mem. sub. nom. Yoder Co.* v. *General Copper & Brass Co.*, 474 F.2d 1339 (3d Cir. 1973); *Pike* v. *Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Micallef* v. *Miehle Co.*, 39 N.Y. 2d 376, 348 N.E. 2d 571, 384 N.Y.S. 2d 115 (1976); *Palmer* v. *Massey-Ferguson, Inc.*, 3 Wash. App. 508, 476 P. 2d 713 (1970); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5 (1956); Darling, *The Patent Danger Rule: An Analysis and a Survey of Its Vitality*, 29 Mercer L. Rev. 583 (1979). It should not be granted a new lease on life.

Finally, there is the possibility that Section 5(b)(2)(c) is simply unintelligible. What indeed is an "inherent characteristic" of a product? It is a question better addressed to a metaphysician than a court. Are not asbestos fibers an inherent characteristic of asbestos insulation? Is it the "unsafe aspect of a product" that is to be recognized by the ordinary consumer, or is it the "inherent characteristic" which is to be recognized by the ordinary consumer? This totally unnecessary and confusing section can cause nothing but mischief. It should be striken from the statute.

Having completed my analysis of Sections 5(b) (2) and (3), I can only conclude that they are contrary to existing law, confusing, and contradict other sections of the Act. They demonstrate that attempts to solve a broad range of problems by drafting "special interest" language is destined to cause major distortions in the law. The entire section fails dismally. It will be an interpretative nightmare for the state and federal appellate courts.

10. Secs. 6(b)(1) and (2):

It should be noted that this section is even more objectionable than Sec. 5 in its constant reiteration of the theme that defendant is liable only if it should have known about 'the danger". Sec. 6 (B)(1) and (2). Since the function of a warning is to give a consumer the choice as to whether he/she wishes to purchase the product, the failure to warn of risks A & B which were known should not preclude recovery for risk C which was not known, if the consumer would have refused to purchase the product at all. See 6(B)(3). Aside from the blatant unfairness to consumers, the drafters have apparently not seen the interaction between these sections.

11. Sec. 6(b)(3) requires that a claimant, to establish a prima facie case, establish that:

"Those warnings or instructions, if provided, would have led a reasonably prudent product user in the course of reasonably anticipated conduct either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant."

Before examining the merits of this section, it should be noted that the section is poorly drafted. How is it possible that a claimant would decline to use the product "in the course of reasonably anticipated conduct"?

More important, however, is the underlying philosophy of this section. It is wrong in concept and in disagreement with substantial case law. It should be clear that this section mandates the utilization of the hypothetical but—for as the test for causation in failing to warn cases. Ultimately, it asks this question: Would the user "have read the warning which was not given". Numerous courts have taken the position that a defendant who has failed to warn cannot ask the plaintiff to carry the burden of coming forward on this question. They have instead imposed a rebuttable presumption in favor of plaintiff that the warning, if given, would have been followed. See, e.g., *Technical Chemical Co.* v. *Jacobs*, 480 S.W.2d 692 (Tex); *Nisser Trampoline Co.* v. *Terre Haute First Nat. Bank*, 332 N.E.2d 820 (1975) rev'd on other ground, 265 Ind. 457, 358 N.E.2d 974; *Reyes* v. *Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974); *Cunningham* v. *Charles Pfizer & Co.*, 532 P.2d 1377 (Okla 1974). Numerous scholars have taken the position that a rigid formulation of the but—for question is inappropriate. See, e.g., Green, The Causal Relation in Negligence Law, 60 Mich.L.Rev. 543 (1962); Malone, Ruminations on Course-in-Fact, 9 Stan. L.Rev. 60

(1956); Thode, Tort Analysis: *Duty-Risk* v. *Proximate Cause and the Rational Allocation of Functions Between Judge and Jury,* 1977 Utah L.Rev. 1.

Even more significant is that jury instructions rarely discuss causation in "but-for" terminology. Most often juries are instructed that defendant's negligence must be the "proximate cause", "producing cause" or "substantial factor" in bringing about the harm. The "but-for" formulation is the harshest articulation of causation and is usually subsumed in broader language for the jury. Sec. 6(b)(3) would become the basis of a jury instruction and would thus be contrary to the practice of the vast majority of courts. Thus, any thought that this section is merely a restatement of existing case law is simply unwarranted.

Finally, as I have noted in my previous writings, the "but-for" test is particularly inappropriate with regard to the "informed consent" type of warning. With regard to many products, a warning cannot function to reduce the risk level attendant to the use of a product. This is especially true with regard to drugs and industrial chemicals. The function of a warning in these cases is to inform the consumer of a non-reducible risk and give him the option not to use the product. This closely parallels the doctrine of "material risk" in the law of medical malpractice. To adopt a theory which imposes a duty to warn of such risks and then to say that recovery will be permitted if, but only if, the product user would not have suffered the harm (*i.e.,* by not using the product) is to engage in "Catch 22" reasoning. The purpose of the warning is to provide the opportunity to the consumer to make a choice. If the warning has not been given, he has been deprived of his right to choose intelligently. To then say that recovery will be denied if the user would have chosen to use the product makes a mockery of the warning duty. Thus, a plaintiff fully informed of the risk of polio vaccination may decide to make a foolish choice and not take the vaccine. That is the consumer's right. As long as his right to informed choice has been affected, it should be no defense that "a class of persons likely to use the product" (Sec. 1(14)), given the risk information, would have chosen to encounter the risk. If the plaintiff never was given the information, he was deprived of his right to choose. A far better test is that articulated by the Washington Court of Appeals in *Miller* v. *Kennedy,* 11 Wash.App. 272, 522 P.2d 852 aff'd 85 Wash.2d 151, 530 P.2d 334 (1975), in which the court, in the context of a medical malpractice case, defined the duty of a doctor to disclose risks in the following manner:

The scope of the duty to disclose information concerning the treatment proposed, other treatments and the risks of each course of action and of no treatment at all is measured by the patient's need to know. The inquiry as to each item of information which the doctor knows or should know about the patient's physical condition is "Would the patient as a human being consider this item in choosing his or her course of treatment?"

This test can easily be paraphrased to meet the product liability situation. Once it has been established that a warning is mandated, then the question should be whether a reasonable consumer would want the information before deciding to utilize the product. It should be noted that this test applies only to those warnings whose function is merely to inform the consumer about non-reducible risks. In those instances where the function of a warning is to effect consumer behavior in his utilization of the product, we must revert to a cause-in-fact analysis. However, cause-in-fact should not be frozen into hard legislative language. It is too complex an issue. It requires the flexibility of common law case-by-case analysis to determine whether, given the underlying substantive goals which the law seeks to protect, the causation issue should be stretched or retracted. This analysis has, at times, been merged with the proximate cause question, and carries with it considerable complexity. To place all of this policy analysis within the framework of S. 44's five line subsection seems close to ludicrous.

12. Sec. 6(d)(1) and (2):

Sec. 6(d) provides:

"Where warnings or instructions are required under subsection (b) or (c), such warnings and instructions shall be given to the product user, unless—

"(1) in light of the practical and economic difficulties of giving the warnings or instructions directly to the product user, the likelihood that the product would cause harm of the type alleged by the claimant, and the probable seriousness of that harm, a reasonably prudent person would have given such warnings or instructions to a third person, inlcuding an employer, who could be expected to take action to avoid the product user's harm or to assure that the risk of harm is explained to the product user; or

"(2) such warnings or instructions were given to a using or supervising expert, where the product is one which may be legally used only by or under the supervi-

sion of such an expert and the manufacturer acted with reasonable prudence to warn or instruct the expert."

This entire section is either unnecessary or fails to address the major problem which faces manufacturers. Where the product is well designed and the only issue is the need for a warning, the case law has not imposed a responsibility to warn employees or third parties where such direct warning on the product is not practical. The cases that have imposed a duty of direct warning on a product which will warn the user directly are cases where it was indeed practical to imprint a warning on the product and where the risk of harm was high. Thus, for example, courts have required that manufacturers of tire rims imprint the size of the rim directly on the metal to prevent mismatching, and manufacturers of wire rope used to lift multi-ton weights have been required to emboss the rated capacity on a non-removable tag so that employees will not mistake the capacity of the rope. *West* v. *Broderick and Bascom Rope Co.*, 197 N.W. 2d 202 (Iowa 1972). This section will probably not effect such results.

The problem area arises when there has been design defect which has been discovered after the product is out in the field and has begun to cause serious injury. Typically, the manufacturer seeks to effect safety by warning rather than by retrofit. Other times it may offer to retrofit, but at some cost to the purchaser. It is in this area where manufacturers express concern that no matter how sharply they warn, they can never get the monkey (of their original negligent design) off their back. But note, Sec. 6(d) does not deal with design defect only with failure to warn. It thus does not respond at all to the problems that confront manufacturers.

There may be some cases where there is no negligence in original design and for which there could only be a post-manufacture duty to warn. This is likely to be rare in the case of industrial machinery, since it is a rare design defect which could not prove to have arisen from negligence. However, in this situation the statute is hardly helpful.

If Section 6(d)(1) was intended to overrule cases where the defendant has given warning to an employer who has failed to pass the warning on to employees, then it has failed in its intended purpose. The problem that courts have faced in the employment cases is that employers who sit under the protection of worker's compensation often have little incentive to install safety features to warn employees against specific risks. If the manufacturer is to seek salvation in the language that an "employer . . . could be expected to take action or . . . assure that the risk of harm is explained" then their expectation will be sorely disappointed. The statutory language begs the question. Where the worker productivity comes in conflict with safety, the employer is often prone to opt for productivity as the more desirable choice. Thus, courts that found against manufacturers in the past will not be intimidated by the language in Section 6(d).

There is an argument that by negative inference the statute has cut back on the shifting duty defense. It should be noted that the shifting duty argument, which cuts off liability if a third person (including an employer) "would have been reasonably expected to assure that action would be taken to avoid the harm," is set forth only to negate a failure to warn claim. No similar provision is found in the design defect section. There is good reason not to make the shifting duty an automatic defense to a design defect case. If the defendant should have designed the safety into the product at the time of manufacturer, then it should not be absolved of responsibility merely because a third person also failied to take protective action. However, there are cases in which it is entirely appropriate to raise the shifting duty argument even when design defect has been clearly established. In *Ford Motor Co.* v. *Wagoner*, 183 Tenn. 392, 192 S.W. 2d 840 (1946).

The defendant was relieved from liability for having defectively designed the hood latch on its automobiles. Ford offered to replace the latches free of charge to owners of the automobile. The owner declined to have the car repaired. When the hood flew up and injured a subsequent owner, Ford was relieved from liability. This is an eminently sensible result. At some point the duty for an existing danger may shift to another responsible party. It would appear that by including a shifting duty defense in the failure to warn section, the inference to be drawn is that it is not an appropriate defense to a design action. That would be an unfortunate interpretation of the statute.

Section 6(d)(2), which establishes a shifting duty defense when warnings or instruction are provided to a supervising expert, is yet another example of the proliferation of new and heretofore undefined terms. When is an expert an expert? The caveat that the product involved be one, which may be legally used only by or under the supervision of a class of experts, is not helpful. Where are we to turn to explain

the term "legally used"? Is it the penal law, the state safety codes, OSHA, administrative regulations, or the common law of torts?

The attempt to reduce the concept of shifting duty or the transfer of responsibility to simple statutory language is bound to fail. The authors of the Restatement (Second) of Torts, when faced with the problem of articulating a rule for shifting duty, recognized that no simple formulation was available. In Section 452, comment f, they said:

"The circumstances may be such that the court will find that all duty and responsibility for the prevention of the harm has passed to the third person. It is apparently impossible to state any comprehensive rule as to when such a decision will be made. Various factors will enter into it. Among them are the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations. The most that can be stated here is that when, by reason of the interplay of such factors, the court finds that full responsibility for control of the situation and prevention of the threatened harm has passed to the third person, his failure to act is then a superseding cause, which will relieve the original actor of liability."

Again, the drafters of S. 44 would have been well advised to leave this area to the common law. The sections as drafted lend themselves to interpretive abuse.

13. Sec. 8:

The key to Sec. 8 is subsection (e). It provides:

"A product seller shall be treated as the manufacturer of a product and shall be liable for harm to the claimant caused by a product as if it were the manufacturer of the product if—

"(1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or

"(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

As drafted, this section is woefully inadequate. The purpose of the statute is to preserve the right of a plaintiff to sue a retailer in case the manufacturer is not subject to the jurisdiction of the state where the action is brought or where there is a determination that the manufacturer is insolvent. The problem with the section as drafted is that the "determination" that claimant will be unable to enforce a judgment is to be made at the time that suit is brought. If it is not at the time of suit, the retailer must ride along on the defense to protect its interest.

However, the lag time between bringing a cause of action and judgment is often as long as four to six years (sometimes longer). Consider the following scenario: Plaintiff sues the manufacturer of a product and a major retailer who sold him/her the product (e.g., Sears & Roebuck, K-Mart). By the time that the case is ready to go to trial (four years after the complaint was filed), the manufacturer has filed for Chapter 11 (not an uncommon occurrence in today's economy). The retailer was dismissed at the time the action was filed because there was no determination at the time suit was filed that the claimant could not enforce a judgment.

The net result of all this is that the plaintiff has no one from whom to collect his judgment. This is simply wrong. The consumer dealt with a responsible retailer and had a right to rely on the integrity and financial stability of his seller. Unless that Act were to provide for revivial of the action against the retailer without requiring plaintiff to retry or delay the long-pending action, this section is just plain wrong.

14. Section 9:

This section is exceedingly difficult to analyze. Its language defies understanding. Many of its sections are holdovers from previous drafts of the bill and have little meaning if the statutory intent is to allow the joint-tort-feasor doctrine to be governed by state law. The entire section needs to be re-examined and re-cast in clear and understandable language.

A. Sec. 9(b)(1) provides:

"In any product liability action, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories (or, if there is no jury, the court shall make findings) indicating—

"(A) the total amount of damages to each claimant for that claimant's harm; and

"(B) the percentage of total responsibility for each claimant's harm attributable to each claimant, each defendant, each third-party defendant, and to any other cause or person who is not a party to the action (other than the claimant's employer or co-employee, where the provisions of section 10 apply)."

This section permits a jury to ascribe fault to: (a) the claimant; (b) each defendant; (c) each third party defendant, and (d) to any other cause or person who is not a party to the action.

If this section were identical to Section 2(a)(2) of the Uniform Comparative Fault Act (UCFA), there should be no objection to it. Sec. 2(a) provides:

"In fall actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under Section 6, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories, or, if there is no jury, shall make findings, indicating:

"(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

"(2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, thirty-party defendant, and person who has been released from liability under Section 6. For this purpose the court may determine that two or more persons are to be treated as a single party."

The reference in UCFA to Sec. 6 permits the reduction by the released person's equitable share of the obligation. The decision of the drafters of UCFA in Sec. 2a was to decrease plaintiff's recovery only in the case of the settling tortfeasor. The commentary to Sec. 6 makes it clear that it does not permit reduction for immune parties. Although tort immunities have eroded, they are not a relic of the past. Thus, some states and municipalities still have either total or partial tort immunity. The federal government still retains substantial immunities, especially for injuries occurring to military personnel.

Although S. 44 will treat the settling tortfeasor similarly to the UCFA, it is clear that under S. 44 immune parties are to be treated differently. In the case of an immune party. S. 44 will reduce the plaintiff's claim by the percentage of the immune party's fault. Thus, S. 44 abrogates the joint tortfeasor policy.

Illustration 10 of UCFA demonstrates how the Sec. 6 of UCFA would operate:

"Illustration No. 10. (Effect of release) A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

"The trial produces the following results: A, 40 percent at fault (equitable share, $8,000); B, 30 percent at fault (equitable share, $6,000); C, 20 percent at fault (equitable share, $4,000); and D, 10 percent at fault (equitable share, $2,000).

"A's claim is reduced by B's equitable share ($6,000). He is awarded a judgment against C and D, making them jointly and severally liable for $6,000.

"Their equitable shares of the obligation are $4,000 and $2,000 respectively.

Where there is an immune party, that party would not be included in the fault apportionment. Practically, the immune party's share would be carried by the non-immune defendant. See Comment, UCFA, Sec. 6.

If one turns to Sec. 9(b)(3) of the Oct. 19 Draft of S. 44, one finds the following scheme:

"(3) The percentage attributable under paragraph (1)(B) to each defendant or each third-party defendant shall be determined by—

"(A) subtracting the percentage of responsibility attributable to the claimant and to any other cause or person who is not a party to the action (other than the claimant's employer or coemployee, where the provisions of section 10 apply) from 100 percent; and

"(B) allocating the percentage which is the result of the subtraction under subparagraph (A) among the defendants and third-party defendants according to their individual responsibility for the claimant's harm."

Utilizing a product liability illustration similar to Illustration 10, I believe that Sec. 9(b)(3) would provide a similar result:

A was injured through the concurrent negligence of B, C and D. His damages are $20,000. A settles with B for $2,000.

The trial produces the following results: B (manufacturer-assembler)—30 percent at fault; C (comp. part manuf.)—20 percent at fault; and D (third party tortfeasor)—10 percent at fault.

If A is 40 percent at fault, then Sec. 9(b)(3) would appear to require that 70 percent be subtracted from 100 percent of total liability (40 percent plaintiff, plus 30 percent settling tortfeasor). The remaining 30 percent is to be allocated according to their individual responsibility. Presumably, this means that C and D will pay 20 percent and 10 percent respectively. This would comport with the UCFA solution. Note: The statutory language on allocation is very confusing, requiring allocation rather than the very clear language of the UCFA.

However, if one of the parties was partially or totally immune from suit and if, for example, that party's fault percentage was 30 percent, then that part's fault

would be subtracted from the total and would not be redistributed among the parties who were at fault. Thus, consider the following hypothetical:

A was injured through the concurring fault of B, C and D. His damages are $20,000. B (municipal government-immune from suit)—30 percent at fault; C (manufacturer)—50 percent at fault; and A (the plaintiff)—20 percent at fault.

As I read Sec. 9(b)(3), the immune party's fault would be borne by plaintiff and would not be carried by the negligent defendants. Thus, the sections as drafted do not fully retain the joint-tortfeasor doctrine as claimed by Sec. 9(g)(2). If Sec. 9(b) did not seek to accomplish this result, it need have only replicated the language of the UCFA.

Finally, I am deeply troubled by the language of Sections 9(b)(1) and (3), which permit the attribution and subtraction of fault "to any other cause." It is totally unclear to me what this phrase is meant to include. If it means that "causal agents (such as natural conditions—wind, ice, snow, rain, etc.) are to be assigned fault and then subtracted from plaintiff's recovery, then these sections are substantively unfair and inconsistent with governing case law. Thus, for example, if defective brakes in combination with icy roads cause an accident, a jury could assign 40 percent of the cause to the icy road and subtract this amount from the plaintiff's recovery. I repeat that I am unsure that the drafters had this in mind but no bill should deal with a subject of such importance in such a haphazard way.

B. Secs. 9(c) and (d)(e) and (f):

These sections are relics from the previous drafts of S. 44 when there was real need to define misuse modification and alteration. This reason for the rigid definitions in the previous drafts was that the joint-tortfeasor liability was abolished to the extent that any party defendant (or any third party) misused or altered the product.

However, if Sec. 9(g)(2) accurately reflects the intent of the drafters, there is no need for page after page refinements on misuse or alteration. A simple statement that in allocating the percentage of fault a jury may consider misuse or product alteration would be totally sufficient. This is the general approach taken by the Uniform Law Commission in UCFA Sec. (1)(b). It avoids the definition and subdefinitions of misuse and alteration set forth in Section 9(c)(d)(e) and (f). Each of these sections contain considerable language which will perforce become the subject of jury instructions and become grist for the mill of appellate court giving birth to reversals, retrials, etc. Given the fundamental change between the previous drafts of S. 44 (in which joint-tortfeasor liability was abolished in cases of misuse, alteration and modification), and the present draft (where joint-tortfeasor liability has been reinstated) there is nothing to be said for these elaborate definitional sections. It is clear to me that the drafters have simply not focused on the changes. This section as it now stands has a definitional appendage that serves no function whatsoever. The entire section should be reworked and simplified.

I apologize that time pressures have prevented me from providing the full analysis that this bill deserves. It is, however, clear to me that to pass the instant legislation would be to foist an ill-considered and poorly-drafted law on the American public. Neither industry nor consumers would be well served.

Sincerely,

AARON D. TWERSKI.

FLEXIBLE PACKAGING ASSOCIATION,
Washington, D.C., March 21, 1984.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: The Flexible Packaging Association, the national trade association representing manufacturers of flexible packaging and suppliers of materials and services used to manufacture such packaging, is pleased to have this opportunity to submit its views on S. 44, the bill to provide for a uniform product liability law. Flexible packaging is produced from paper, plastic or cellulose films, aluminum foil or a combination of such materials and is used to store, protect and display all kinds of fresh, processed or prepared foods and other products. It ranges from simple paper over-wraps and plastic bread bags to sophisticated composite material pouches in which foods can be directly sterilized and processed. The more than 900 flexible packaging plants in the United States are responsible for producing over 100 billion packages a year. The Association repesents nearly 80% of the flexible packaging sold in the United States.

Last Spring the Flexible Packaging Association submitted comments to this Committee in support of the need for federal legislation that will bring a critical degree of uniformity and certainty to product liability law. Since that time a new draft of S. 44, involving significant compromises to accomodate the concerns of consumer groups that the bill, if enacted, would insulate manufacturers and product sellers from any product liability actions, has been tendered for consideration. Our Association continues to support this bill in prinicple. Recognizing the necessity for this legislation, we can support this compromise bill if such modifications were necessary to ensure enactment.

Today the vitality and stability of our national economy is threatened by tremendous disparities in the development and interpretation of product liability law between the fifty states. Those opposed to this bill have agrued that in our federal system the states have had the sole responsibility for the development of tort law. That argument ignores the explicit constitutional power granted to Congress to regulate interstate commerce, a power in this instance made necessary by the radical departures from traditional tort principles by state courts during the past twenty years.

It is clear that balance must be restored. A manufacturer or product seller cannot possibly develop or market a product with any degree of practical certainty that will satify the fifty different standards of care and rules of liability that have been developed. Actions that will not adversely affect a producer's litigation position in one jurisdiction could constitute damaging evidence in another. For example, in several jurisdictions technological improvements to a machine product can be used as evidence that the earlier models were defective. Such a rule clearly penalizes progress and stifles innovation.

In conclusion, the Flexible Packaging Association vigorously supports the adoption of S. 44 which will establish uniform guidelines and procedures for product liability actions. The certainty that will result from preempting the maze of confusing state tests and the often incomprehensible application of those tests by the state courts will restore stability and fairness to this chaotic area of the law.

Yours very truly,

RICHARD A. LILLQUIST, *President.*

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